(29,004)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 454.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

vs.

HURNI PACKING COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 26, 1923.

a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1921, of said Court, before the Honorable Walter H. Sanborn and the Honorable Robert E. Lewis, Circuit Judges, and the Honorable Arba S. Van Valkenburgh, District Judge.

Attest: E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit. [Seal United States Circuit Court of Appeals Eighth Circuit.]

Be it remembered that heretofore, to-wit: on the first day of February, A. D. 1921, a transcript of record pursuant to a writ of error directed to the District Court of the United States for the Northern District of Iowa, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the Mutual Life Insurance Company of New York was Plaintiff in Error, and the Hurni Packing Company was Defendant in Error, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 UNITED STATES OF AMERICA,
Northern District of Iowa, ss:

Pleas Before the United States District Court for the Northern District of Iowa at a Term Begun and Held at Sioux City, Iowa, on the 17th Day of October, 1920, Before the Honorable Henry T. Reed, Presiding Judge.

No. 230. Law.

HURNI PACKING COMPANY, a Corporation, Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant.

Be it remembered, That heretofore, to-wit on the 3rd day of December 1917, there was filed in the office of the Clerk of said Court in the above entitled case, a Transcript from the District Court of Woodbury County, Iowa, which is in words and figures as follows: to-wit:

(PETITION.)

The plaintiff for cause of action against the defendant herein alleges as follows:

1. The plaintiff is a corporation duly organized and existing under the laws of the State of Iowa relating to corporations for pecuniary profit, and has been engaged in the business of buying and selling live stock, and of buying, selling, and manufacturing meat products.

2. The defendant is a corporation duly organized, existing and doing business as a life insurance company under the laws of the State of New York relating thereto, and authorized to transact such business under the laws of the State of Iowa relating to foreign insurance companies.

3. The plaintiff states that on or about the 23rd day of August 1915, for a valuable consideration to it in hand paid, the defendant issued and delivered to the plaintiff its ordinary life policy
2 No. 2,251,875 upon the life of Rudolp Hurni of Sioux City, Iowa, for the sum of $25,000 to be paid to the plaintiff, its successors or assigns upon receipt by the defendant at its home office in the city of New York of due proof of the death of the said Rudolf Hurni, a copy of which said policy is attached hereto, marked Exhibit "A" and made a part hereof.

4. Plaintiff states that on the 4th day of July 1917, the said Rudolph Hurni died, the said policy being on that date still in full force and effect, and on or about the 19th day of August 1917, the defendant was furnished at its home office with due proof of the death of the said insured.

5. Notwithstanding the fact that the plaintiff, who was the beneficiary of the said policy at the date of the decease of the said Rudolf Hurni, and is still the owner of every right, claim and interest thereunder, and had performed all of the conditions thereof required to be performed by it, including the payment of all premiums, the defendant refuses to pay the amount due under the said policy, upon demand being made by the plaintiff therefor.

Wherefore the plaintiff demands judgment against the defendant in the sum of Twenty-five Thousand Dollars ($25,000) with interest thereon from the 19th day of August 1917, together with the costs of this action. Edwin J. Stason, Attorney for Plaintiff.

STATE OF IOWA,
Woodbury County, ss:

I, F. A. Gale, being first duly sworn depose and say that I am Vice President of the plaintiff corporation, and as such officer have knowledge of the matters alleged in the foregoing petition that I have read the said petition and know the contents thereof and the allegations therein made are true as I verily believe. F. A. Gale.

Subscribed in my presence and sworn to before me by the said F. H. Gale this 10th day of September 1917. Edwin J. Stason, Notary Public. (Seal.)

3 **(EXHIBIT A, INSURANCE POLICY.)**

(Exhibit A attached to the petition at law, is a complete copy of the Life Insurance Policy sued upon in this action. By the terms of a Stipulation filed with the Clerk on the 27th day of December 1920, and which Stipulation is copied in full at the close of this Transcript, it is agreed by the parties hereto that the following par-

agraphs of the policy of insurance will be sufficient to be copied in this transcript on appeal.)

107. Number 2,251,875. Amount, $25,000. Age, 47. Annual Premium, $1,069.75.

The Mutual Life Insurance Company of New York,

In consideration of the annual premium of one thousand sixty nine and 75,100 dollars, the receipt of [*of*] which is hereby acknowledged, and of the payment of a like amount upon each twenty third day of August hereafter until the death of the insured,

Promises to pay, at the Home Office of the Company in the City of New York, upon receipt of said Home Office of due proof of the death of Rudolph Hurni, of Sioux City, Iowa, Woodbury, State of Iowa, herein called the insured, Twenty Five Thousand Dollars, less an indebtedness hereon to the Company and any unpaid portion of the premium for the then current policy year, upon surrender of this policy, properly receipted to R. Hurni Packing Company, its successors or assigns, the beneficiary, with right to the insured to change the beneficiary.

Death of Beneficiary before Insured; Change of Beneficiary: If any Beneficiary die before the insured the interest of such beneficiary will vest in the Insured, unless otherwise provided herein.

When the interest of a Beneficiary shall have vested in the Insured, or when the right to change the beneficiary has been reserved, the Insured, if there be no existing assignment of this Policy, may, while this Policy is in force, designate a new Beneficiary, with or without reserving the right to change the beneficiary, by filing written notice thereof at the Home Office of the Company, accompanied by this Policy for suitable indorsement hereon. Such change
4 shall take effect upon the indorsement of the same on the policy by the Company.

Premiums: All premiums are payable in advance at said Home Office or to any agent of the Company upon delivery, on or before date due, or a receipt signed by either the President, Vice President, Second Vice President, Secretary, or Treasurer of the Company and countersigned by said agent.

A grace of thirty days (or month if greater) subject to an interest charge at the rate of five per centum per annum, shall be granted for the payment of every premium after the first during which time the insurance shall continue in force. If death occur within the period of grace, the overdue premium and the unpaid portion of the premium for the then current policy year, if any, shall be deducted from the amount payable hereunder.

Except as herein provided the payment of a premium or installment thereof shall not maintain this policy in force beyond the date when the next premium or installment thereof is payable. If any premium or installment thereof be not paid before the end of the period of grace, then this policy shall immediately cease and be-

come void, and all premiums previously paid shall be forfeited to the Company except as hereinafter provided.

108. Conditions; Residence and Travel: This Policy is free from any restrictions as to residence and travel.

Suicide: The company shall not be liable hereunder, in the event of the Insured's death by his own act, whether sane or insane, during the period of one year after the date of issue of this policy as set forth in the provisions of the application endorsed hereon or attached hereto.

Incontestability: This Policy shall be incontestable except for nonpayment of premiums, provided two years shall have elapsed from its date of issue.

This policy, and the application therefor, copy of which is endorsed hereon or attached hereto, constitute the entire contract between the parties hereto. All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no statement of the insured shall avoid or be used in defense to a claim under this policy unless contained in the written application herefor, and a copy of the application is endorsed on or attached to this Policy when issued.

5 If the age of the insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the current age.

Agents not authorized to modify this policy or extend the time for paying a premium.

In Witness whereof, the Company has caused this policy to be executed this 23rd day of August 1915. W. J. Eastman, Secretary. Charles A. Peabody, President. Countersigned: —— ——, Asst. Registrar."

(APPLICATION OF RUDOLPH HURNI, FOR INSURANCE.)

Date Policy, August 23rd, 1915; Age, 47.

The applicant, upon request, may have policy antedated for a period not to exceed six months.

This application is made to the Mutual Life Insurance Company of New York. All the following statements and answers, and all those that I make to the Company's Medical Examiner, in continuation of this application, are true, and are offered to the Company as an inducement to issue the proposed policy. I expressly waive, on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has attended or examined me, or who may hereafter attend or examine me, from disclosing any knowledge or information which he thereby acquired. The proposed policy shall not take effect unless and until the first premium shall have been paid during my continuance in good health, and unless also the policy shall have been delivered to and received by me during my continuance in good health; except in

case a conditional receipt shall have been issued as hereinafter provided.

1. My name is (in full) Rudolph Hurni.

2. (*a*) My residence and period of residence; Street, 3212 M. S. Blvd.; Town, City or Village; Sioux City; County,—Woodbury; State, Iowa; For period of 30 years.

(*b*) My place of business is, Hurni Packing Co.

6 (*c*) My P. O. Address is, Hurni Pkg. Co., Sioux City, Iowa.

(*d*) My former residences were—Switzerland for period of 17 years.

3. Date of my birth; Day 24; Month February. Year, 1868, Age at last birthday 47 years.

4. Place of my birth; Town or City, Sausontonia, State of Province; Switzerland; Citizen or Subject of, U. S.

5. (*a*) My present [occipation] is (Full details, business or trade and name of firm) President and Manager of Hurni Packing Co.

(*b*) I have been so engaged 20 years.

(*c*) My other occupations are, None.

(*d*) My former occupations were—Butcher.

(*e*) Period of time so engaged; 10 years.

6. I do not contemplate any change of occupation, or becoming connected with any military or naval organization or service or going to any foreign or tropical countries, except; (if none, so state). No.

7. Are you connected with any military or naval organization or service officialy or otherwise? (Ans. Yes or no). No.

8. I agree that any policy the company may issue upon this application shall contain the following clause;

"If the insured under this policy engages in military or naval service or in work as a civilian in any capacity whatever in connection with actual warfare during the first policy year, there shall immediately become due and payable to the Company a single extra payment of three per centum (3%) of the face of the policy. If the insured shall engage in such military or naval service or in such work as a civilian within the first policy year and shall die within one year from the date of beginning such service or work, without having paid to the Company said additional charge prior to the beginning of such service or work, the Company's liability hereunder shall be limited to one-fifth of the face of the policy."

7 9. (*a*) Name (in full) of the persons i. e. beneficiary to whom the sum insured is to be made payable: R. Hurni Packing Company.

(*b*) Residence; Sioux City, Iowa.

(*c*) Relationship or insurable interest (in proposed life) of said beneficiary.

(*d*) Privilege of changing the beneficiary from time to time provided policy has not been assigned, is desired. (Ans. yes or no.) Yes.

10. I have the following insurance on my life in other Companies or Associations:

Name of company or association.	Amount.
N. Y. Life	$10,000
Germania Life	5,000
Bankers of D. M.	2,000
M. W. A.	3,000

And no others.

11. (*a*) Amount of insurance applied for—$25,000.
(*b*) Plan, (State fully)—Ordinary Life Plan.
(*c*) Premiums to be paid—Annually.

12. Policy providing for "Waiver of Premium," in case of permanent total disability in accordance with terms of Company's forms now in use is desired if the Company consents to grant it. (Ans. Yes or No.) No.

13. No negotiations for other insurance on my life are now pending or contemplated except as follows; (if none, so state). No.

14. I have never made an application nor submitted to an examination for life insurance upon which a policy has not been issued on the plan and premium rate originally applied for, except to the following companies or associations; (if none, so state). No.

15. I have paid $— in cash to the subscribing Soliciting Agent and received a conditional receipt therefor, signed by the Secretary of the Company making insurance in force from this date, provided this application shall be approved and policy duly issued.

8 During the period of one year following the date of issue of the Policy of Insurance for which ap-lication is hereby made, I will not engage in any of the following extra hazardous occupations or employments; retailing intoxicating liquors, handling electric wires or dynamos, blasting, mining, submarine labor, æronautic ascensions, the manufacture of highly explosive substances, service on any railroad train or track or in switching or in coupling cars, or on any steam or other vessel, unless written permission is expressly granted by the Company. It is understood and agreed that the risk of death will not be covered by the policy if such death occur by my own act, whether sane or insane, during the period of one year next following the date of issue. I agree that only the President, Vice President, a Second Vice President, a Secretary or the Treasurer of the Company can make, modify or discharge contracts, or waive any of the Company's rights or requirements, and that none of these acts can be done by the agent taking this application.

Signature in full of person whose life is proposed for Insurance: Rudolph Hurni; Dated, Sioux City, Iowa, on September 2, 1915.

I have known the above named applicant for 10 years, and saw him sign this application. H. E. Rose, Soliciting Agent.

I have is-ued conditional receipt No. —.

STATEMENTS TO MEDICAL EXAMINER.

These must be recorded in the handwriting of the Medical Examiner who should satisfy himself that the applicant's statements and answers are full and complete.

16. What is your full name? Rudolph Hurni.

17. Are you married? Yes.

18. What illnesses, diseases, injuries or surgical operations have you had since childhood?

Name of disease, etc.: Pneumonia.
Number of attacks: One.
9 Date of Each: Fall 1899.
Duration: 3 weeks.
Severity: Moderate.
Results: Good.

Date of complete recovery? Don't remember date.

19. State every physician or [practicioner] who has prescribed for or treated you or whom you have consulted in the past five years.

Name of physician or [practicioner]: None consulted.
Address: ——.
When consulted: —— —, ——.
Nature of complaint: Give full details above under Q. 18.

20. Have you stated in answer to question 18 all illnesses, diseases, injuries or surgical operations which you have had since childhood? (Ans. Yes or No.) Yes.

21. Have you stated in answer to question 19 every physician and [practicioner] consulted during the past five years and dates of consultation? (Ans. Yes or No.) Yes.

22. (*a*) Are you in good health? Yes.

(*b*) If not, what is the impairment?

23. (*a*) How much weight have you gained in the past year? None.

(*b*) How much weight have you lost in the past year? None.

(*c*) If any change, state cause.

24. (*a*) What is your date of birth? Feb. 24, 1868.

(*b*) Is this date or is your age a matter of record. Yes, in Switzerland?

(*c*) If so, where? In Switzerland.

10 25. Are you now or have you ever been engaged in any way in the sale or manufacture of beer, wine, or other intoxicating liquors? (Ans. Yes or No.) No.

26. (*a*) Have you used wine, spirits or malt liquors during the past year? Yes.

(*b*) If so what has been your daily average in past year? Two glasses of beer per week.

(*c*) How much have you used in any one day at the most. Two or three glasses.

(*d*) Have you been intoxicated during the past five years? No.

(*e*) Have you ever taken treatment for alcoholic or drug habit? No.

(*f*) If a total abstainer, how long have you been so?

If any of the questions 27 to 36 below are answered Yes, give details in space adjacent. Answer Yes or No.

27. Have you ever raised or spat blood? No.

28. Have you a rupture or hernia? No.

29. Have you any bodily deformity? No.

30. Have you lost any part of arm or leg? No.

31. Have you any impairment of sight or hearing? No.

32. Have you ever been under treatment at any asylum cure, hospital, or sanitarium? No.

33. Have you ever changed your residence on account of your health? No.

34. Do you contemplate making any change in your residence? No.

35. Has any member of your household suffered from tuberculosis, or consumption, during the past year? No.

36. Has there ever been any suspicion that any of your parents, brothers or sisters ever had tuberculosis or consumption, cancer, insanity, epilepsy, paralysis, or apoplexy? No.

11 37. Family record of applicant:

Father; 89; specific cause of death? Old age. How long sick? Don't know.

Mother; 75-80. Specific cause of death? Old age. How long sick? One day.

Age of Father's Father at time of death. Over 90.

Age of Father's Mother at death. About 90.

Age of Mother's Father at death? Very old.

Age of Mother's Mother at death? Very old.

Brothers; Three living one dead.

Age: Living 57, health good; 51, health good; 44, health good. One brother died in infancy.

Sisters, three living, two dead.

Age: 59, health good; 55, health good; 42, health good. Sisters dead: age 31, childbirth; sick few days and sister died in infancy.

Dated at Sioux City, State of Iowa, the 3rd day of September 1915.

Witness: C. G. Gibson, M. D.

I certify that each and all of the foregoing statements and answers were read to me and fully and correctly recorded by the Medical Examiner. Rudolph Hurni. (Signature in full of person examiner.)

Filed Sept. 11, '17 J. A. Johnson, Clerk of District Court; By F. J. Tripp, Deputy.

(NOTICE OF THE FILING OF PETITION AND ACCEPTANCE OF SERVICE.)

[Filed Sept. 11, 1917.]

To the Mutual Life Insurance Company of New York:

You are hereby notified that on or before the 28th day of September A. D. 1917, the petition of the plaintiff in the above entitled cause will be filed in the office of the Clerk of the District Court of the State of Iowa, in and for Woodbury County, claiming of you that sum of Twenty Five Thousand Dollars, money as justly due from you and interest thereon at 6 per cent from the 28th day of July, A. D. 1917.

12 Being the amount agreed to be paid by you under your policy No. 2,251,875 upon the death of Rudolf Hurni, due proof of which was made to your office on or before said date.

And unless you appear thereto and defend before noon of the second day of the next term, being the November Term of said Court, which will commence at Sioux City, Iowa on the 5th day of November 1917, default will be entered against you, and judgment and decree rendered thereon as provided by law.

Dated this 27th day of September 1917. Edwin J. Stason, Attorney for Plaintiff.

On the back of said notice is the following:

"Service of the within notice is hereby accepted for the defendant, the Mutual Life Insurance Company of New York, under the provisions of Section 1808, as amended by Section 1683-r3, of the Iowa Code, this 28th day of August 1917. Emory H. English, Commissioner of Insur., by C. S. Brykit, Deputy."

[Endorsement omitted.]

(ORDER OF REMOVAL TO FEDERAL COURT.)

[Filed November 5, 1917.]

This cause coming on for hearing upon the petition and bond of the defendant above named for an order transferring this action to the United States District Court for the Northern District of Iowa, Western Division, and it appearing to the Court that the defendant has filed his petition for such removal in due form of law, and that the defendant has filed his bond duly conditioned with good and sufficient surety as provided by law and that defendant had given plaintiff due and legal notice thereof, and of the time of hearing thereon, and it appearing to the Court that this is a proper cause for removal to said District Court of the United States;

Now Therefore said petition and bond are hereby accepted, and it is Hereby Ordered and adjudged that this action be, and it hereby

is removed to the United States District Court for the Northern District of Iowa, Western Division, and the Clerk of this Court is
13 hereby directed to make up and certify the record in said action for transmission to said court, forthwith.

Done in open Court this 5th day of November 1917. Geo. Jepson, Judge.

[Endorsement omitted.]

(DEFENDANT'S ANSWER.)

[Filed Dec. 13, 1917.]

For answer to Plaintiff's petition, defendant states:

Division One.

That it admits the allegations of Paragraphs I and II of plaintiff's petition; that it denies each and every other allegation, statement and claim therein made or contained, except as herein admitted or otherwise answered.

It admits that an ordinary life policy No. 2,251,875 was issued by defendant, upon the life of Rudolf Hurni, the amount of said policy being the sum of $25,000.00, and the beneficiary named therein being Hurni Packing Company; it admits that said policy was dated August 23, 1915, but denies that the same was issued or delivered on or about August 23, 1915, and avers that in fact the same was issued and delivered on or about the 13th day of September 1915. It admits that Exhibit "A" attached to plaintiff's petition is a substantial copy of the said policy, and the application of Rudolf Hurni attached to the same, but whether or not the same is a true and exact copy defendant is unable to say and therefore denies the same; it admits that Rodolf Hurni died on or about the 4th day of July 1917, and admits the receipt of alleged and purported proofs of death.

Defendant denies that said policy was on or about the 4th day of July 1917, or at any other time, in force and effect; denies that said policy was ever a valid and binding policy of insurance and denies that any valid or binding contract of insurance was ever consummated between Rudolf Hurni and the plaintiff and his defendant, and denies that plaintiff ever had any right or claim by reason of said policy against this defendant; denies that there is the sum of Twenty-Five Thousand ($25,000.00) Dollars due or owing to the plaintiff, or any one else on account of said policy; and denies that there is anything due or owing to the plaintiff from this defendant by reason of said policy, or for any other reason whatever, except as may be in this answer admitted.

14 The defendant avers that the policy of insurance, upon which plaintiff seeks to recover in this case, was procured by Rudolf Hurni through fraud, deceit, misrepresentation and concealment, in that the said Rudolf Hurni made untrue statements and

false representations, and practiced fraudulent concealment in the application to defendant for the issuance of the policy in suit.

That said policy was issued by defendant in reliance upon the truth of each and all of the statements and representations made by said Hurni in his said application, nor would defendant have issued said policy had it known that said application contained false representations and untrue statements, or that said Hurni had concealed matters and things which good faith required him to disclose in said application. That defendant did not know or become advised until after the death of said Hurni that said application contained false representations and untrue statements.

That by reason of the facts and circumstances, the policy under which plaintiff makes its claim herein never was and never became of any force or effect, nor a binding policy of insurance, nor is there any liability thereon or thereunder on the part of the defendant, and therefore plaintiff is not entitled to have or maintain this action nor to recover herein.

That defendant has heretofore made in writing a legal offer and tender to return the premiums paid to it in accordance with the terms and conditions of said policy, together with legal interest thereon, which said offer and tender the plaintiff refused and still refuses to accept. That defendant is at all times willing, able, and ready to repay to plaintiff, or to whomsoever may be entitled thereto, the amount of the premiums paid to it, together with interest in accordance with its written offer, and will ever be ready, able and willing to so repay said premiums and interest.

Wherefore, defendant prays that the policy sued on be declared null and void and of no force and no validity, and that plaintiff's petition be dismissed at its costs and prays judgment for the costs incurred by defendant.

Division Two.

Further answering, defendant states:

That it admits the allegations of Paragraph- I and II of Plaintiff's petition; that it denies each and every other allegation, statement and claim therein made or contained, except as herein admitted or otherwise answered.

15 It admits that an ordinary life policy No. 2,251,875 was issued by defendant, upon the life of Rudolf Hurni, the amount of said policy being $25,000.00 and the beneficiary named therein being Hurni Packing Company; it admits that said policy was dated August 25, 1915, but denies that the same was issued or delivered on or about August 23, 1915, and avers that in fact the same was issued and delivered on or about the 13th day of September, 1915. It admits that Exhibit "A" attached to Plaintiff's petition is a substantial copy of said policy, and the application of Rudolf Hurni attached to the same, but whether or not the same is a true and exact copy defendant is unable to say and therefore denies the same; it admits that Rudolf Hurni died on or about the 4th day of

July, 1917 and admits the receipt of the alleged and purported proofs of death.

Defendant denies that said policy was on or about the 4th day of July 1917, or at any other time, in force and effect; denies that said policy was ever a valid and binding policy of insurance and denies that any valid or binding contract of insurance was ever consummated between Rudolf Hurni and the plaintiffs and this defendant, and denies that plaintiff ever had any right or claim by reason of said policy against this defendant; denies that there is the sum of Twenty Five Thousand ($25,000.00) dollars due or owing to the plaintiff or any one else on account of said policy; and denies that there is anything due or owing to the plaintiff from this defendant by reason of said policy, or for any other reason whatever, except as may be in this answer admitted;

Defendant shows to the court, that among other things it was provided in the application of Rudolf Hurni, upon which the policy in suit was issued, as follows:

"The proposed policy shall not take effect unless and until the first premium shall have been paid during my continuance in good health, and unless also the policy shall have been delivered to and received by me during my continuance in good health."

Defendant avers and alleges that said Rudolf Hurni was not in good health at the time the policy was issued and delivered to him, nor was the first premium thereon paid during his continuance in good health, all of which was well known to said Rudolf Hurni but was not known to this defendant until after the death of said Hurni.

That said Hurni made in his application for the policy in suit and particularly to the medical examiner of defendant who
16 examined Hurni as a part of his application, certain false representations and untrue statements, and further said Hurni practiced fraudulent concealment in that he failed to disclose matters and things to said Medical Examiner which were specifically inquired about by said examiner. That said false representations and untrue statements and such fraudulent concealment were made and practiced by said Hurni with the intent and purpose of deceiving and misleading said Medical Examiner and thus to induce him to certify said Hurni to defendant company as being in good health and as recommending said Hurni for insurance. That said Medical Examiner relied on the truth of the statements and representations made by Hurni to him and recorded in Hurni's application and was induced thereby to recommend said Hurni as a fit subject for insurance. That thereby this defendant, relying on the truth of the representations and statements made by Hurni in his said application, all of which statements and representations were certified by Hurni as being true, was induced thereby to issue the policy in suit and delivered the same to Hurni, which it would not have done otherwise.

That by reason of the facts and circumstances, the said policy never became or was of any force and effect and never was a binding policy of insurance.

That by reason thereof, plaintiff is not entitled to have or maintain in this action or to recover on said policy from this defendant. That by reason thereof there is not and never was any liability on the part of this defendant to the plaintiff, or any one, by reason of said policy.

That defendant has heretofore made in writing a legal offer and tender to return the premiums paid to it in accordance with the terms and conditions of said policy, together with legal interest thereon, which said offer and tender the plaintiff refused and still refuses to accept. That defendant is at all times willing, able and ready to repay to plaintiff, or to whomsoever may be entitled thereto, the amount of premiums paid to it, together with interest in accordance with its written offer, and will ever be ready, able and willing to so repay said premiums and interest.

Wherefore, defendant prays that the policy sued on be declared null and void and of no force and no validity and that Plaintiff's petition be dismissed at its costs and prays judgment for the costs incurred by the defendant.

17 Division Three.

Further answering, defendant states:

That it admits the allegations of Paragraphs I and II of plaintiff's petition; that it denies each and every other allegation, statement and claim therein made or contained, except as herein admitted or otherwise answered;

It admits that an ordinary life policy No. 2,251,875 was issued by defendant, upon the life of Rudolf Hurni, the amount of said policy being $25,000.00 and the beneficiary named therein being Hurni Packing Company; it admits that said policy was dated August 23, 1915, but denies that the same was issued or delivered on or about August 23, 1915, and avers that in fact the same was issued and delivered on or about the 13th day of September 1915. It admits that Exhibit "A" attached to plaintiff's petition is a substantial copy of said policy and the application of Rudolf Hurni attached to the same, but whether or not the same is a true and exact copy defendant is unable to say and therefore denies the same; it admits that Rudolf Hurni died on or about the 4th day of July 1917, and admits the receipt of alleged and purported proofs of death.

Defendant denies that said policy was on or about the 4th day of July, 1917, or at any other time, in force and effect; denies that said policy ever was a valid and binding policy of insurance and denies that any valid or binding contract of insurance was ever consummated between Rudof Hurni and the plaintiff and this defendant, and denies that plaintiff ever had any right or claim by reason of said policy against this defendant; denies that there is the sum of Twenty-Five Thousand ($25,000.00) Dollars due or owing to the plaintiff, or any one else on account of said policy; and denies that there is anything due or owing to the plaintiff from this defendant by reason of

said policy, or for any other reason whatever, except as may be in this Answer admitted.

That it is provided in the application upon which the policy in suit was issued, a true copy of which is attached to said policy, among other things as follows:

"This application is made to the Mutual Life Insurance Company of new York. All the following statements and answers, and all those that I make to the Company's Medical Examiner, in continuation of this application, are true, and are offered to the Company as an inducement to issue the proposed policy."

18 That said application consists of a printed form on which are recorded in writing the statements, representations and answers of Rudolf Hurni, which representations and answers are certified by Rudolf Hurni in said application as being fully and correctly recorded therein.

That the following statements and answers made by said Hurni and recorded in his application were false and untrue.

18. What illnesses, diseases, injuries or surgical operations have you had since childhood? Ans. Pneumonia. (Number of attacks) One (Date of each) Fall 1899; (Duration) 3 weeks; (Severity) Moderate; (Results) Good; (Date of complete recovery) Don't remember date.

19. State every physician or practitioner who has prescribed for or treated you, or whom you have consulted in the past five years. (Ans.) None consulted.

20. Have you stated in answer to question 18 all illnesses, diseases, injuries, or surgical operations which you have had since childhood? (Ans.) Yes.

21. Have you stated in answer to question 19, every physician, and practitioner consulted during the past five years and dates of consultations. (Ans.) Yes.

22. (*a*) Are you in good health? (Ans.) Yes.

(*b*) If not what is the impairment? (No ans.)

32. Have you ever been under treatment at any asylum, cure, hospital or sanitarium? (Ans.) No.

Defendant alleges that each and all of the foregoing statements, representations and answers of said Hurni were false and untrue: and were known to said Hurni to be false and untrue; that said Hurni made said statements, representations and answers to the Medical Examiner of the defendant with the fraudulent intent and purpose of deceiving said Medical Examiner and thus inducing him to issue a certificate of health to him, the said Hurni, and recommending him as a fit subject for insurance to defendant company. That said Medical Examiner was induced thereby to recommend said Hurni as a fit subject for insurance to defendant company, which he would not have done otherwise. That said Medical Examiner had no knowledge of the falsity of said statements, representations and answers, but on the contrary relied on the truth thereof. That thereby defendant company was induced to issue

the policy of insurance applied for, which it would not have done otherwise. That by reason thereof said policy never be-
19 came of any force or effect and was void at all times, and the defendant company is under no liability by reason thereof.

That because of the facts and circumstances, plaintiff is not entitled to have or maintain this action, nor to recover on the policy in suit.

That defendant has heretofore made in writing a legal offer and tender to return the premiums paid to it in accordance with the terms and conditions of said policy, together with legal interest thereon, which said offer and tender the plaintiff refused and still refuses to accept. That defendant is at all times willing able and ready to repay to plaintiff, or to whomsoever may be entitled thereto, the amount of the premiums paid to it, together with interest in accordance with its written offer, and will ever be ready, able and willing to so repay said premiums and interest.

Wherefore, defendant prays that the policy sued on be declared null and void and of no force and validity, and that plaintiff's petition be dismissed at its costs and prays judgment for the costs incurred by defendant. Read & Read, Sargent Strong & Struble, Attorneys for Defendant.

STATE OF IOWA,
County of Polk, ss:

R. L. READ, being duly sworn on oath states that he is one of the members of the firm of Read & Read, of counsel for the defendant in the foregoing action; that he is authorized by the defendant to verify this answer; that by virtue of his office as attorney he has information in regard to the matters and things referred to in said Answer; that he has read the foregoing Answer and knows the averments thereof, and that said answer is true to the best of his knowledge, information and belief. R. L. Read.

Subscribed and sworn to before me this 30th day of November, 1917. Florence M. Todd, Notary Public, Polk County, Ia. [Seal.]

[Endorsement omitted.]

20 **(REPLY.)**

[Filed March 14, 1918.]

The plaintiff for a reply to the answer of the defendant herein states as follows:

1. The plaintiff admits that the application made by Rudolf Hurni, upon which the policy of insurance in question was issued by the defendant, contains the words set out by quotation in Divisions Two and Three of the said answer, and contains the questions and answers numbered 19, 20, 21, 22 and 32 set out in Division Three of the answer.

2. The plaintiff also admits that the defendant, before filing the said answer, made to the plaintiff in writing the tender alleged in the answer, and that plaintiff refused to accept the tender thus made.

3. The plaintiff denies each and every affirmative allegation of the answer not thus admitted.

Wherefore the plaintiff renews the prayer of its petition. Edwin J. Stason, Attorney for Plaintiff.

STATE OF IOWA,
Woodbury County, ss:

I, Edith Hurni, being first duly sworn deposes and say that I am Secretary of the plaintiff corporation; that as such secretary I am more familiar with the matters alleged in the foregoing reply than is any other officer thereof; that I have read the foregoing reply and know the contents thereof and the allegations therein made are true as I verily believe. Edith Hurni.

Subscribed in my presence and sworn to before me by the said Edith Hurni this 13th day of March 1918. Edwin J. Stason, notary Public.

[Endorsement omitted.]

(AMENDMENT TO REPLY.)

[Filed October 15, 1918.]

Comes now the plaintiff and amends its reply by adding thereto the following:

The plaintiff further states that upon the deceased making application for the insurance, the defendant caused him to be examined by its examining physician, who, after such examination, declared the applicant to be a fit subject for insurance in the defendant
21 company, and so reported to it, and that by reason thereof the defendant is estopped in law and in fact from claiming that deceased was not in condition of health stated by him in his application for insurance. Edwin J. Stason, Attorneys for Plaintiff.

STATE OF IOWA,
Woodbury County, ss:

I, Minnie B. Hurni, being first duly sworn depose and say that I am president of the R. Hurni Packing Company, the plaintiff herein; that I am familiar with the matters alleged in the foregoing amendment to reply; that I have read the same and know the contents thereof, and the allegations therein made are true as I verily believe. Minnie B. Hurni.

Subscribed in my presence and sworn to before me by the said Minnie B. Hurni this 14th day of October 1918. Edward J. Stason, Notary Public. [Seal]

[Endorsement omitted.]

(STIPULATION AS TO THE INTRODUCTION OF THE TESTIMONY OF ANY WITNESS WHO TESTIFIED UPON THE FORMER TRIAL OF THIS CASE.)

[Filed June 2, 1920.]

It is hereby stipulated and agreed by and between the parties to the above entitled action that at the trial of this cause at the May 1920 Term of this Court, either party hereto may, in addition to such oral or documentary evidence as it may desire to introduce, offer and read in evidence the testimony of any witness who testified upon the former trial hereof, and that the evidence so read shall be of the same force and effect as though given by said witness orally in Court at this trial, said testimony to be read from the bill of exceptions prepared in this cause in connection with the former trial hereof and now on file in this Court, and that no questions or objections shall be raised or made by either party as to the right of the other to read said former testimony instead of summoning the witnesses themselves.

It is further stipulated and agreed that all objections to the testimony of such witnesses made at the time of giving said testimony in the former trial shall be considered as being made at this trial, and the rulings of the Court made thereon shall be the same, except as the same may be changed by the Court during the reading of said testimony and that all exceptions to said rulings as shown by said bill of exceptions, herein referred to, shall stand to said rulings as shown by said bill of exceptions herein referred to, shall stand to said rulings and be considered as taken at this trial.

22

Dated this 28th day of May 1920. Edwin J. Stason and Charles M. Stillwell, Attorneys for Plaintiff. Read & Read, Jepson and Struble, Attorneys for Defendant.

[Endorsement omitted.]

(AMENDMENT TO REPLY.)

[Filed June 2, 1920.]

Comes now the plaintiff, leave of court having first been granted, and amends its reply as follows:

The plaintiff states that the defendant failed to contest the policy of life insurance payable to the plaintiff, by the tender of the return

of the premiums paid or otherwise within the two year period in which the policy might be contested as provided by the terms thereof, and it is now barred from setting up or urging any of the defenses set forth in its answer.

Wherefore the plaintiff demands judgment as prayed in its petition. Edwin J. Stason and Charles M. Stillwell, Attorneys for Plaintiff.

STATE OF IOWA,
Woodbury County, ss:

I, Minnie B. Hurni, being first duly sworn depose and say that I am President of the Plaintiff corporation and as such officer I have knowledge with reference to the matters alleged in the foregoing reply; that I have read the said reply and the statements therein made are true to the best of my information and belief. Minnie B. Hurni.

23 Subscribed in my presence and sworn to before me by the said Minnie B. Hurni this 2nd day of June 1920. Edwin J. Stason, Notary Public.

[Endorsement omitted.]

(MOTION TO STRIKE OUT AMENDMENT TO REPLY.)

[Filed June 2, 1920.]

Comes now the defendant in the above entitled matter and moves the court to strike from the files in this cause the amendment to the reply of plaintiff filed June 2, 1920, for the reason:

1st. That the same was filed too late being filed on the date and just before the jury was called in this case.

2nd. Because the same raises a new issue not heretofore raised in this case.

3rd. Because said allegations contained therein states no matter constituting a waiver or estoppel against the defendant and does not avoid the affirmative defenses alleged in defendant's answer. Jepson & Struble, Attorneys for Defendant.

[Endorsement omitted.]

(JURY IMPANELED; TRIAL, OCTOBER 19, 1920.)

Now this 19th day of October A. D. 1920, the above entitled cause coming on for trial the plaintiff appears by E. J. Stason and Sears Snyder & Gleysteen its attorneys, and the defendant appears by Jepson & Strubel and Read and Read its attorneys; thereupon the Court so directing, the Clerk calls a jury of twelve good and lawful men, citizens of the District to-wit:

Perry Miller, Marcus; Axel L. Reed, Mason City; John Kerr, Lonerock; Wm. S. Young, Ida Grove; Ray T. Johnson, Williams;

G. R. Wharton, Aurelia; Thos. Durant, Dows; John Caulley, Larchwood; P. J. Clasen, Emmetsburg; J. L. James, Thornton; Albert C. Schroeder, Palmer; T. E. Herbert, Marcus; who were duly empaneled and sworn to well and truly try the issues joined in this cause and a just and impartial verdict render according to the evidence introduced and the instructions given them by the court upon the law of the case; thereupon the hour for the adjournment of Court having arrived, the further trial of this cause is postponed until 9:30 A. M. of October 20, 1920, the Court first admonishing the jury not to permit any conversation among themselves about the matters connected with this cause of action.

(TRIAL, OCTOBER 20, 1920.)

Now this 20th day of October, 1920, the above entitled cause again coming before the Court, in the progress of the trial thereof, the attorneys for the respective parties and the jurors all being present the trial of this cause is resumed, and the opening statements of counsel are made and the introduction of the evidence on the part of plaintiff is commenced and concluded, and is followed by the introduction of the evidence on the part of the defendant, which is concluded, thereupon the plaintiff introduces its evidence in rebuttal whereupon at the close of the evidence, plaintiff moves the court for a directed verdict in its favor, upon grounds stated in the motion as dictated to the court reporter; and thereupon the defendant moves the Court for a directed verdict in its favor upon the grounds stated in its motion as dictated to the court reporter; and thereupon the arguments are commenced on plaintiff's motion and continued until the hour of adjournment of court for the day, whereupon the further hearing of this cause is postponed until 9:30 o'clock of the forenoon [*noon*] of October 21, A. D. 1920, the Court cautioning the jurors as heretofore.

(TRIAL, OCTOBER 21, 1920.)

Now this 21st day of October A. D. 1920, the above entitled cause again coming before the Court in the progress of the trial thereof, the attorneys for the respective parties and the jurors all being present the further hearing of the attorneys' arguments upon plaintiff's motion for an instructed verdict is resumed and continued until the hour of arrival of the hour for the adjournment of court for the day; whereupon the further hearing of this cause is postponed until 9:30 o'clock of the forenoon of October 22, 1920, the court cautioning the jurors as heretofore.

(TRIAL, VERDICT, AND JUDGMENT, OCTOBER 22, 1920.)

Now this 22nd day of October, 1920, the above entitled cause again coming on for hearing in the progress of the trial thereof, the attorneys for the respective parties and all the jurors being present;

thereupon the arguments of counsel upon the respective motions to instruct the jury is resumed and concluded; the court being now fully advised in the premises finds that the motion of the defendant to direct a verdict in its favor be and the same is hereby denied, to which ruling of the court the defendant duly excepts; and the court further finds that the motion of the plaintiff to direct a verdict in its favor be and the same is hereby sustained to the granting of which motion the defendant duly excepts; Thereupon the jury under the instruction of the court return the following verdict, to-wit:

United States District Court, Northern District of Iowa, Western Division.

Verdict.

HURNI PACKING COMPANY, Plaintiff,

vs.

MUTUAL LIFE INSURANCE COMPANY, Defendant.

We the jury by direction of the Court find for the plaintiff in the sum of $29,762.50. W. S. Young, Foreman.

To which direction of the Court and verdict of the Jury the defendant duly excepts. Whereupon on motion of the attorneys for the plaintiff:

It is Ordered Adjudged by the Court that the Plaintiff the Hurni Packing Company do have and recover of and from the defendant the Mutual Life Insurance Company of New York, the sum of Twenty Nine Thousand Seven Hundred and Sixty Two and 50/100 dollars ($29,762.50) with interest thereon at the rate of 6% from this date and the costs of this proceeding assessed by the Clerk at $— and that execution issue therefor. To which judgment of the Court the defendant duly excepts.

On motion of attorneys for the defendant, it is ordered that the defendant have sixty (60) days in which to settle and file a bill of exceptions.

26 **(ORDER ALLOWING APPEAL AND FIXING AMOUNT OF SUPERSEDEAS BOND.)**

Now, to-wit on this 2nd day of December, 1920, came the defendant by its attorneys, and file- herein and presented to the Court its petition, praying for the allowance of a writ of error and assignment of error intended to be urged by it, and praying also that a transcript record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals of the Eighth Circuit, and that such other and further proceedings may be had as may be proper in the premises;

Whereupon, upon consideration thereof, the court does allow said writ of error as prayed, and that a certified transcript of the record testimony, exhibits, stipulations and of all proceedings, be forthwith transmitted to the said United States Circuit Court of Appeals for the Eighth Circuit; that defendant give bond according to law in the penal sum of Thirty-seven Thousand Five Hundred dollars, ($37,500.00) the same to operate as a supersedeas bond. Henry T. Reed, Judge of the District Court of the United States in and for the Northern District of Iowa, Western Division.

(BILL OF EXCEPTIONS.)

And now at this time, to-wit: Oct. 20th, 1920, this cause coming on for hearing before Hon. Henry T. Reed, Presiding Judge, a jury having been duly impaneled and sworn after the opening statements of counsel for respective parties, the following proceedings were had, to-wit:

Mr. Stason: The plaintiff offers in evidence Ex. A.

Mr. Struble: To the introduction of Ex. A, the defendant now objects as incompetent, irrelevant, immaterial, for the reason that heretofore this cause was submitted to this court; that thereafter, said cause was by writ of error taken to the circuit court of appeals for the United States for this district, and was by said circuit court of appeals, determined upon the record as made and presented by the plaintiff, that no recovery could be had on the said policy.

The Court: Well, the objection is overruled at present.

27 Mr. Struble: It is admitted by the defendant, that Rudolph Hurni, the insured named in the policy sued on, died in Sioux City, Iowa, on July 4th, 1917; that at the time of his death, all premiums then due on the policy in suit had been paid.

Plaintiff rests.

(MOTION OF DEFENDANT FOR A DIRECTED VERDICT AND EXCEPTION TO THE RULING OF THE COURT THEREON.)

Mr. Struble: The defendant at this time, and at the close of the plaintiff's testimony, plaintiff having rested, moves the Court to instruct the jury to return a verdict in its favor, for the reason that said cause has been heretofore submitted to said court; that by writ of error the same was taken to the circuit court of appeals of this circuit; that upon the issues as made and the record as made by the plaintiff upon the trial of this case, it was determined by said Circuit Court of Appeals, that no recovery could be had upon the policy sued on in this case, the plaintiff in said cause having elected to make up its record of the basis of its recovery, and that after said cause had been decided by the Circuit Court of Appeals, attempt was made by the plaintiff to have the action of the Circuit Court of Appeals reviewed by the United States Supreme Court, which the

Supreme Court of the United States refused to do, and the plaintiff cannot now seek in this action to make a different or other record, or elect to proceed further in the trial of this case, having elected to attempt to remove said cause from the Circuit Court of Appeals to the United States Supreme Court.

The Court: That motion is also overruled.

Defendants excepts.

Dr. C. E. CLINGAN, called on behalf of the defendant, first being duly sworn by the court, testified as follows:

Q. Your name is Dr. C. E. Clingan?
A. Yes sir.
Q. Where do you reside, doctor?
A. Sioux City.
Q. How long have you lived here?
A. Oh, 43 years.
Q. You are a practicing physician?
A. Yes sir.
Q. How long have you followed that profession?
A. The same length of time.
Q. Did you know Rudolph Hurni of Sioux City, in his lifetime?
A. Yes sir.
28 Q. Did Rudolph Hurni ever consult you in your professional capacity during his lifetime?
A. Yes sir.
Q. Dr. Clingan, do you know whether or not you were consulted professionally by Rudolph Hurni, and whether or not you prescribed for him, and treated him professionally, during a period of five years preceding the 2nd day of September, 1915, that would be May 2nd, 1910, to September 2nd, 1915, do you know whether you did?
A. Oh, I suppose I did.
Q. You had prescribed and treated him for some period of time?
A. Oh, for a great many years.
Q. Do you have any books or records, which served to refresh your recollection as to the days or dates you may have treated Rudolph Hurni professionally?
A. I have a ledger, a card ledger.
Q. Have you within the last two or three years, examined that ledger for the purpose of ascertaining what it may show as to whether or not you treated Hurni within that five year period I have mentioned?
A. I don't know whether that would include this report that was made out to the beneficiary for the company or not.
Q. Doctor, examine that paper please.
—. Yes sir, that is mine.
Q. You did examine your books and records for the purpose of determining whether or not you had prescribed for him?
A. Yes sir, and they were checked up by your representative.

Q. Now, doctor, you made a memorandum statement what the books showed, did you?
A. Yes sir.
Q. And you have just now examined that statement, have you?
A. Yes sir.
Q. Doctor, having refreshed your recollection by an examination of the statement, I will ask you whether or not you were consulted by Rudolph Hurni, or whether you prescribed for him and treated him professionally during the year 1911?
A. That's what it shows here.
Q. I am asking you whether or not you did?
A. I evidently did, I did.
Q. You did?
A. 1911, Jan. 2nd.
Q. Did you visit him at his home?
A. Yes sir.
Q. In January, 1911, now doctor, were you consulted by Rudolph Hurni, or did you prescribe for him or treat him professionally in the year 1913?
A. Yes sir.
Q. I meant to ask you about the year 1912 too?
A. That year too.
Q. In 1912?
A. Yes sir.
29 Q. What dates in the year 1912, did you prescribe for him, or treat him?
A. I prescribed for him Feb. 21st, and April 24th.
Q. And at those times, did he consult with you professionally?
A. Yes sir.
Q. He asked medical advice, did he?
A. Yes sir.
Q. And you give him medical advice and treatment?
A. Yes sir.
Q. Now, how about the year 1913?
A. 1913, do you want the dates?
Q. Did you prescribe for him or treat him, or were you consulted by him in the year 1913?
A. I did.
Q. On what dates, doctor?
A. October 4th, October 15th, October 26, November 10, November 15, December 15.
Q. Do you know whether those consultations or treatments were had or given at the house or at the office?
A. There were three of them at his house, or two of them at his house, October 4th, and October 15th.
Q. Now doctor, were there any consultations had, or prescriptions given to Hurni during the year 1914?
A. Yes sir.
Q. How many?
A. March 4th, there was a prescription.
Q. Was that at the office or at the house?

A. It was at my office.

Q. Now did Hurni consult you professionally, or did you prescribe for him, or treat him in a medical way, as a doctor, during 1915?

A. March 9th was a visit.

Q. Where was that?

A. At his house; May 31st, a visit at his house. June 5th, a prescription, that was at my office, October 27th.

Q. That would be later than September 2nd. I was asking only with regard to previous to September 2nd 1915. Now do you remember any other times during that five year period preceding September 2nd 1915, that you consulted him, you were consulted by him, or prescribed for him, or treated him?

A. I wouldn't know anything about him, only as my books show.

Q. You entered a charge when you did prescribe?

A. Yes sir.

Q. And that was in the usual custom of your business was it?

A. Yes sir.

Q. That is the way you kept track of your business?

A. Yes sir.

Q. And then you sent bills to your patients?

A. Yes sir.

Q. And they would pay I presume?

A. Yes sir.

Q. Did Hurni pay you for the charges you entered for the consultations and treatment you have just related?

A. Yes sir.

Q. Do you recall the circumstances leading up to the fact that Hurni went to Excelsior Springs in 1913; I want to change that, do you recall the circumstances leading up to the fact of Hurni going to Excelsior Springs in 1913?

A. What year is that?

Q. 1913 do you recall his going to Excelsior Springs?

A. I wouldn't know because I did not keep any account of his going to Excelsior Springs.

Mr. Stason: If the court please, I think we want to reserve the right at the close of this witness' testimony, to object to all of the testimony of this witness on the ground that evidence that no contest was made within the two years' incontestable period; that this testimony apparently relates to the question of fraud and misrepresentation, and if it does relate to fraud and misrepresentation under the issues as presented now, and under the record in this case, the record showing that no contest was made within the two years from the date of this policy is irrelevant and immaterial. We are just waiting for that one phase of the testimony to make the objection, I would like to make the motion at the close of the testimony.

Mr. Read: If the court please, I think the orderly manner of procedure would be to make all the motions counsel has to make, at the time he wants to make them, and I do not concede any right at this time, or any right to reserve, except as the Court might grant it. If Mr. Stason wants to object to any testimony we have to offer, I would

like to have him do it, so we may be advised what he is objecting to, and when he is doing it. It comes too late at this time surely.

Mr. Stason: I want to say, if that is the purpose of this testimony they are trying to elicit from this witness, we will make it now rather than at the close.

Court: I think the proper procedure is to make the objections to the testimony when offered, and you may do that.

Mr. Stason: Objected to for the reason that the record in this case at this time shows beyond dispute, that if the purpose of this testimony is to show fraud or misrepresentation on the part of Mr. Hurni, that the defendant is now barred by reason of the clause in the policy as follows:

31 "This policy shall be incontestable except for non-payment of premiums, providing two years have elapsed from the date of its issue." And any testimony of this witness which may be given in response to this question, therefore would be incompetent, irrelevant and immaterial.

The Court: The objection is overruled.

Q. Do you remember the question, doctor?

A. Why, I don't know what time it was he went to Excelsior Springs, I know he did go there, I don't know whether 1913 or 1915.

Q. Do you recall doctor, having talked with him about Excelsior Springs?

A. Yes, sir, I did.

Defendant excepts as last above.

Overruled.

Mr. Stason: Do I understand exceptions are made in the record to all questions?

The Court: For your own protection you would better do it.

Mr. Struble: May the record show the defendant excepts to the ruling of the court on the motions heretofore made?

The Court: The rule in regard to exceptions is well settled in this court; both of you know it; if you want to protect yourselves, you would better save it.

Q. Do you recall talking to Hurni about going to Excelsior Springs?

A. Yes sir.

Q. What, if anything, did you say to him?

Plaintiff objects for the reasons that if it is for the purpose of testimony to prove either fraud or misrepresentation, or that the insured was not in good health at the time the policy was issued that the testimony is now immaterial, by reason of the fact that more than two years elapsed after the policy went into effect before the defendant attempted to contest the policy, and that it is now barred from making a contest on the policy on the ground of fraud or misrepresentation, or the fact if it be one, that the insured was not in good health.

The Court: The objection is overruled.

Mr. Stason: Note an exception.

The Court: Exception allowed.

32 Mr. Stason: Might we have this objection stand?

(Question read:) A. To Mr. Hurni?

Q. Yes.

A. I told him he would break down if he did not get out a away from his business.

Q. Now you know it is a fact do you not, that shortly after y told him that, that he did go to Excelsior Springs?

A. I think he did.

Cross-examination:

Q. You had known Mr. Hurni for a long time hadn't you?

A. Yes sir.

Q. You had been the family physician?

A. Yes sir.

Q. How long had you been the family physician?

A. Since their marriage, I don't know how long that has been.

Q. You treated the other members of the family besides Mr Hurni?

A. Yes sir.

Q. You knew Mr. Hurni in a business way did you?

A. Oh no.

Q. Where was your office, doctor?

A. 5th and Nebraska streets.

Q. Been there for a number of years?

A. Yes sir.

Q. You say that Mr. Hurni consulted you at different times?

A. Yes sir.

Q. Well during those times, how long was he in the office?

A. I couldn't tell that.

Q. What was his difficulty, speaking generally.

A. Just such as any individual might have.

—. Well, what were they?

A. Why, *there* were generally the result of overwork, what w call taking cold.

Q. You consider taking cold the result of overwork?

A. Well, he would take cold if his system was run down.

Q. And the extent of your consultations or visits with him wa with reference to those colds was it?

A. Yes sir.

Q. You say you were out at his house from time to time?

A. Yes sir.

Q. Visit other members of the family?

A. Yes sir.

Q. Did you ever visit him alone out there?

A. Yes sir.

Q. What were his difficulties then?

A. Well simply a result of his over work.

Q. Mr. Hurni was a man to work very hard?

A. Yes sir.
Q. Had for a number of years?
A. Yes sir.
Q. Do you know the conditions under which he worked, the place of work?
A. Just like all packing houses, cold and wet and hot.
Q. Are these packing house places where conditions are such people would ordinarily take cold?
A. They do frequently.
Q. Now you say you told him he would break down. Was he making complaint at that time about having a cold, or anything at that time, just been over working?
A. Yes sir.
Q. Was his condition, the same condition the ordinary business man working under the same circumstances he was?
A. Yes sir, I think it is.
Q. You visited him out there at the house, how long was he confined, do you know.
A. Oh he never was confined more than a day or so, I never made more than two visits at any one time.
Q. Then do you know whether he went back to work?
A. He said he did.

Witness excused.

Dr. C. G. GIBSON, called on behalf of the defendant, first being duly sworn by the Clerk, testified as follows:

Q. Your name is Dr. C. G. Gibson?
A. Yes sir.
Q. You are a practicing physician doctor?
A. Yes sir.
Q. How long have you resided in Sioux City?
A. About 20 years.
Q. Practicing all that time?
A. Yes sir.
Q. Doctor state whether or not during the year 1915, you were making medical examinations for the Mutual Life Insurance Co. of New York?
A. I was.
Q. Been doing that work for some considerable time?
A. Yes sir.
Q. Do you recall the circumstances of making a medical examination in connection with the application of Rudolph Hurni.
A. I do.
Q. I presume you recollect some specifically because it has been recalled to your mind lately?
A. I expect.
Q. Will you examine the document marked Exhibit B by the reporter have you examined Exhibit B doctor?
A. Yes sir.

Q. You observe a part of Ex. B being under the general heading, "Statement of Medical Examiners." State whether or not this is the report of the medical examination you made of Rudolph Hurni, you have testified to?

A. I think it is.

34 Q. Observe this document, the part of it you mention bears date of September 3rd, 1915. Does that refresh your recollection at all in respect to the time you examined him?

A. I have stated there some where about that.

Q. How is that.

A. I would say somewhere about that time.

Q. If it bears date that date what would say as to whether or not that was the date?

A. I would say it was.

Q. Did Mr. Hurni sign this document in your presence?

A. Yes sir.

Q. Is that his signature under the right hand corner, "Statement of medical examiner?"

A. I witnessed that signature.

Q. Did you see him sign it?

A. Yes sir.

Q. Hurni came to you to be examined as an applicant for life insurance in the Mutual Life Insurance Co., of New York, did he not?

A. Yes sir.

Q. Now state when you make a so-called medical examination of an applicant, and particularly when you made this examination of Hurni, what did you do, what was your purpose of it, tell the jury and court?

A. The questions in the medical examination blank are to be answered first. Those questions are read to the applicant and his answers recorded as he gives them, possibly not in the exact words, but in the exact meaning, that is to elicit the applicant's previous history. After that the medical examination is made, physical examination.

Q. Now in respect to the questions commencing with No. 16, and including question No. 37, under the heading, "Statements to medical examination," I will ask you whether or not all those questions were read to Mr. Hurni at the time you made this examination?

A. They were.

Q. And did Hurni make answer to those questions when you read them to him?

A. He did.

Q. Then what, if anything, did you do in respect to the answers?

A. They are recorded in my handwriting.

Q. You recorded them?

A. Yes sir.

Q. In pen and ink ?

A. Yes sir.

Q. So state whether or not the answers as recorded to those questions were made by you?

A. They were.

Q. State whether or not the answers as they appear recorded are in the words of Rudolph Hurni or whether or not they are substantially in the words of Rudolph Hurni.

A. They are.

35 Q. In other words do I understand you to mean you recorded on Exhibit B. the answers which he made to you at that time, to the questions which you had put to him?

A. Yes sir.

Q. I notice that among other questions appearing under the general heading "Statements to medical examiners," one, No. 19, which is as follows, "State every physician or practitioner who has prescribed for or treated you, or whom you have consulted in the past five years," I will ask you to state whether or not that question was put by you to Rudolph Hurni?

A. It was.

Q. Did he answer it?

A. He did.

Q. Is his answer correctly recorded in the application as he gave it to you?

A. Yes sir, it is.

Q. And what was the answer he gave?

A. None consulted.

Plaintiff objects for the reason that the instrument is the best evidence.

Mr. Reed: Will it be conceded the document bears the answer to it?

Mr. Stason: It will be the answer is as appears on the report.

Mr. Reed: It is conceded by the plaintiff as I understand it, that the answer as given by Rudolph Hurni to the question put to him appears or is recorded.

Mr. Stason: No, the objection is that the report of the medical examination is the best evidence of what the application shows, and any oral evidence would be immaterial, irrelevant and incompetent.

Mr. Reed: There is no stipulation, and all but the objection goes out.

Q. Now calling your attention to question No. 21 as follows, "Have you stated in answer to question 19, every physician or practitioner you have consulted in the past five years, and date of consultation?" did you put that question to Mr. Hurni?

A. I did.

Q. Did he answer it?

A. He did.

Q. What was the answer he gave?

A. "Ye

Q. Did record that answer in the application?

A. I so recorded it.

36 Q. Calling your attention to Question 22-A as follows: "Are you in good health?" I will ask you if you put that question to Mr. Hurni?

A. I did.
Q. And likewise as to the question 22-B did you put that to him?
A. No sir.
Q. Now what was the question given to 22-A?
A. Yes.
Q. So that there is no answer left to make to 22-B was there?
A. None whatever.
Q. Calling your attention to question No. 18, as follows: "What illness or disease, injuries or surgical operations have you had since your childhood," did you put that question to him?
A. I did.
Q. Is the answer he gave correctly recorded in the application?
A. Yes sir.
Q. Calling your attention to question No. 32 as follows: "Have you ever been under treatment at any asylum?"

The Court: Why don't you ask him if he stated and put to Mr. Hurni the question 18 and did he answer it, and did you record the answer then.
Mr. Reed: The witness stated the answer he gave was correctly recorded in the application.

Q. What answer did he give to question No. 18.
A. The name of the disease was pneumonia, one attack, the date was the fall of 1899, duration three weeks, severity moderate, results good. Date of complete recovery, don't remember.
Q. Did he tell you he had had any other diseases or surgical operations since childhood?

Plaintiff objects as calling for a conclusion and no statement of fact.
Court: As I understand the doctor said he recorded the answer he gave.

Q. Now again calling your attention to question 32 as follows: "Have you ever been under treatment in any asylum, or cure, or hospital, or sanatarium," did you put that question to Mr. Hurni?
A. I did.
Q. Did he answer it?
A. He did.
Q. What did he say?
A. No.
Q. Now following the proceeding had up to that point doctor, then afterwards, did you make a physical examination of Hurni?
A. I did.
Q. What did you do in making a physical examination, just briefly describe it.
37 A. Well, there is more of a list or routine prescribed by the company making the physical examinations.
Q. Let me ask, the physical examination is just what it sounds like it would be?

A. Yes sir, going over him physically, and finding out what his general condition is, if you can.

Q. Now doctor, will you examine Ex. B., and particularly the part from question 38-A to question 52, under the general heading of medical examiners report, and state whether or not that is your handwriting where the pen and ink writing appears.

A. I think it is.

Q. It is your handwriting you say?

A. Yes sir, it is.

Q. Is that your signature attached to the medical examiners report?

A. Yes sir.

Q. Did you recommend Rudolph Hurni to the Mutual Life Insurance Company as a fit applicant for life insurance?

A. I did.

Q. Now what, if anything, led you to make such a recommendation?

Plaintiff objects as incompetent, irrevelant, immaterial if the object is to prove fraud or misrepresentation or ill health at the time of issuing the policy, for the reason that the defendant under the record as it exists in this case has failed and did fail to contest the policy within the period of two years from its date of issue, and for the further reason that it calls for a conclusion of the witness and no statemnet of fact.

Overruled.
Exception.

A. Well, my reasons for recommending was from his negative previous history, and from his physical findings at that time, his physical examination.

Q. What, if any knowledge, did you have of his previous history.

A. Simply what he gave me, his answers to the questions.

Q. You mean the statements he had made to you, concerning which you have just testified?

A. Yes sir.

Q. And which you say were recorded under the heading of statement to medical examiners?

A. Yes sir.

Q. Did you have any other report or information about him other than what you had obtained from his own statements to you, and your physical examination of him.

A. No sir.

Q. Upon what, if anything, in particular, did you rely when you recommended Mr. Hurni as an applicant for insurance?

38 Plaintiff objects as last above.
Overruled.
Exception.

A. Well, I relied a great deal of course on his past history, and not being able to find anything in particular in his physical condition, why I passed him.

Q. Did you rely upon the answers he had given to you concerning his past history, as being true?

Plaintiff objects on the grounds last urged, and for the further reason that it is leading and suggestive.
Overruled.
Exception.

A. I did.
Q. Had you known that the answer which Rudolph Hurni gave to question No. 19, which was that he had not consulted a physician in five years previous to your examination, was untrue, would you have recommended Mr. Hurni, to the Mutual Life Insurance Co., as a fit applicant for insurance, when and as you did?

Plaintiff objects for the reason that it is incompetent, irrelevant, immaterial, calling for a conclusion of the witness and not a statement of fact, and assuming a fact not shown in the record, and in so far as it is an attempt on the part of the defendant to establish a defense of fraud and misrepresentation, or a condition of ill health at the time the policy was obtained, as incompetent, irrelevant, immaterial, because the defendant has failed to contest the policy, as shown by the record in this case, within the period of two years from the date of issuance.
Overruled.

A. I undoubtedly would not have recommended him at the time had I known that until further investigation had been made.

Plaintiff moves to strike the answer as not responsive insofar as "Had I known."
The Court: It is hardly a direct answer to your question and to that extent the objection will be sustained.
Mr. Read: The motion to strike the answer is sustained?
39 The Court: The objection is sustained to that answer, because it is not a direct answer, it is a qualified answer only.

Q. Doctor, had you known that the answers that Hurni gave to questions 18 and 19 and 20 were untrue, would you have recommended Mr. Hurni as a fit applicant for insurance to the Mutual Life Insurance Co., when you did.

Plaintiff objects to this question, the same objection as was made, the objection last made.
The Court: I am going to sustain that objection.

Exception.

Q. Would you have recommended Hurni to the Mutual Life Insurance Co., as a fit applicant for insurance, had you known or had cause to believe that any of the questions were untruthfully answered?

Plaintiff objects for the reason that it is incompetent, irrelevant, immaterial, incompetent for the reason that it is asking the witness

as to whether or not he had cause to believe them to be untrue, and further incompetent because it is calling for a conclusion of the witness not as an expert, not calling for a statement of fact. And on the further ground that it is an attempt to prove fraud or misrepresentation, or ill health on the part of the insured at the time the policy was issued; that under the present state of the record it is incompetent, irrelevant, immaterial, because the record shows that the defendant has failed to contest the policy within the period of two years from the time the policy was issued, and for the further reason that it is assuming certain facts not shown by therecord in this case.

The Court: The objection is sustained upon that last objection, it assumes something not shown at this ime.

Exception.

Q. Upon what, if anything, did you rely, when you recommended Mr. Hurni as an applicant for insurance?

A. I relied upon the truthfulness of his answers regarding his personal history, and upon the findings of his physical examination.

Plaintiff objects on all of the grounds last urged.

Overruled.

Exception.

Q. You mean the answers he gave and which you recorded in the application?

A. Yes, sir.

Same objection.

Overruled.

Exception.

Q. If the answers given to you by Mr. Hurni were untrue, or if any of them were untrue, and you had known it, would you have recommended Hurni as a fit applicant for life insurance, when and as you did?

Plaintiff objects for the reason that the witness is asked to assume certain facts not shown by the record, and calling for a conclusion of the witness, and therefore incompetent, irrelevant, immaterial, and further incompetent, because it is not shown that is the intention to attempt by this question to establish the defense of either ill health or misrepresentation in the policy. It is irrelevant and immaterial because the defendant has failed to contest the policy within the two year period.

The Court: The first ground of that objection is sustained, but the latter, that is the failure to contest the policy within the two years, I do not rule on that now.

Mr. Struble: The defendant at this time offers to prove by this witness, that had he known that at the time that Mr. Hurni answered questions 18, 19, 20 and 21 were untrue, that this witness

would not have issued the certificate of health, when the same was issued by him, nor would he have recommended said Hurni as a fit applicant for insurance to the defendant.

Plaintiff objects to the offer for the reason that it attempts to prove fraud or ill health on the part of the insured, misrepresentation in obtaining the policy; it is irrelevant and immaterial, because the record shows in this case conclusively that the contest was not made within the two years' contestable period, and further objected to for the reason that it calls for a conclusion of the witness and no statement of fact, and for the reason that it is assuming something that may or may not exist in the witness' mind, and not now a matter of record. For the further reason that the offer is not made in the proper form.

The Court: The objection is sustained upon the ground that the opinion of the witness is asked upon a question of which there is no evidence before the jury now; it assumes something that is not shown.

41 Mrs. RUDOLPH HURNI, called on behalf of the defendant, first being duly sworn by the Clerk, testified as follows:

Q. You may give your name to the reporter please.
A. [Mr.] Rudolph Hurni.
Q. Where do you live?
A. In Sioux City.
Q. How long have you lived here?
A. 23 years.
Q. Are you the widow of Rudolph Hurni?
A. Yes, sir.
Q. Where did he live at the time of his death?
A. Sioux City.
Q. How long had he lived in Sioux City?
A. He came here in 1885.
Q. In what business was he engaged in Sioux City?
A. In the packing business.
Q. How long had he been engaged in that business?
A. Since 1892.
Q. During the time that he was engaged in that business, was he the managing head of the packing business?
A. Yes, sir.
Q. Was he engaged in any other business than the packing business during that time?
A. The serum business.
Q. Where was that business conducted?
A. Right across from the packing plant.
Q. Did he have active charge of that business himself?
A. Yes sir.
Q. Was he engaged in any other business than the packing business and the serum business?
A. Why he had a stock farm.
Q. Where was that stock farm located?
A. About three miles from town.

Q. Was that a farm which he operated himself, or had rented?
A. Why he operated it himself?
Q. Would he himself do any work on the farm?
A. No sir.
Q. What did he do in connection with the operation of the farm?
A. Why, he just looked after it.
Q. Was your husband during his lifetime a very busy man?
A. Yes, sir.
Q. What is the fact as to whether he worked seven days of the week?
A. Why he worked seven days a week.
Q. What was his habit as to going to work, was he an early riser, or did he go to work early in the day?
A. Yes, sir.
Q. What was his habit about working late at night?
A. Well, he just liked to work.
Q. Did he work late at night?
A. Why not much after he came home.
42 Q. Was he away from home a great deal nights attending to his work?
A. No sir.
Q. Was he at the packing plant frequently late at night about his work?
A. Yes sir.
Q. Was he out on the farm frequently at night attending to his work there?
A. No sir.
Q. Were you and he married at the time he had the pneumonia?
A. Yes sir.
Q. Prior to that time had his health been good?
A. Yes sir.
Q. Do you recall of the time he went to Excelsior Springs?
A. Yes sir.
Q. Do you remember what year that was?
A. 1914.
Q. Shortly prior to his going to Excelsior Springs, Mo., had he consulted with Dr. Clingan, you know?
A. Yes.
Q. Were you present at the time of that consultation?
A. Yes sir.
Q. How soon after that consultation did Mr. Hurni go to Excelsior Springs?
A. A couple of weeks after that.
Q. How long was he at Excelsior Springs?
A. Three months.
Q. Did you go with him to Excelsior Springs?
A. Yes sir.
Q. Did the other members of the family go with him?
A. Yes sir.
Q. While you were at Excelsior Springs, and he was there, did he consult any doctors there?

Plaintiff objects as incompetent, irrelevant, immaterial; imma terial because of the fact that it appears from the record in this cas at this time, that the defendant did not attempt to contest, and di not contest the policy of insurance upon which this action i brought, within the two year period provided for in the policy.
The Court: Overruled for the present.
(Question read.)

A. Why just for the purpose of getting the right water.
Q. Did he consult a doctor by the name of Bogart?

Plaintiff objects as last above.
Same ruling.
Exception.

A. Yes sir.
Q. How many times?
A. It was once.

43 Same objection.
Same ruling.
Exception.

Q. Did Dr. Bogart prescribe any medicine for him?
A. No sir.
Q. Did he give him any treatment of any kind?
A. No sir.

Same objection.
Same ruling.
Exception.

Q. Did he consult Dr. Prather at Excelsior Springs?

Same objection.
Same ruling.
Exception.

A. Yes sir.
Q. How soon after he arrived at Excelsior Springs, did he consult Dr. Prather?
A. About two weeks later.
Q. Were you present at the time of the first consultation with Dr. Prather?
A. Yes sir.
Q. How long were you there in Dr. Prather's office?
A. About a half an hour.
Q. Did Dr. Prather at that time make any physical examination of Mr. Hurni?

Same objection.
Same ruling.
Exception.

A. No sir.

Q. Was there any other conversation between Dr. Prather, or Mr. Hurni relative to Mr. Hurni's health?

Plaintiff objects as incompetent, irrelevant, immaterial in view of the fact the record shows conclusively no contest was made on the part of the defendant within the two year period of limitations. If the object of the inquiry is to prove or tend to prove the defense of fraud and misrepresentation on the part of the insured or the fact that the insured was not in good health at the time the policy was issued.

The Court: It is overruled.

Exception.

44 A. No sir.

Q. During the time you were there for that half hour, what was the conversation between Dr. Prather and Mr. Hurni?

Same objection.
Overruled.
Exception.

A. Well, I was not in the office.

Q. Then while the doctor and Mr. Hurni were talking together you were not present?

A. No.

Q. Do you know personally as to whether at that time Dr. Prather prescribed any treatments for Mr. Hurni?

Same objection.
Overruled.
Exception.

A. Why he just told him to take a serum treatment, to brace up.

Q. And at that time, and upon that occasion, was there any serum treatment [give] Mr. Hurni by Dr. Prather?

Same objection.
Overruled.
Exception.

A. Yes sir.

Q. In what manner was that treatment given?

Same objection.
Overruled.
Exception.

A. It was injected into his skin.

Q. What instrument was used in the giving of that treatment?

Same objection.
Overruled.
Exception.

A. Why, just a small instrument, injected.

Q. Was it a syringe of some kind?
A. Yes sir.
Q. Was there a portion of the instrument which seemed to contain a fluid of some kind?
A. Yes sir.
45 Q. And was this fluid injected into Mr. Hurni's arm or body?
A. Yes sir.
Q. Were you down there at Excelsior Springs during all the time Mr. Hurni was there?
A. Yes sir.
Q. During the time you and he were there, did Mr. Hurni receive further treatments of serum, injections by Dr. Prather?

Same objection.
Overruled.
Exception.

A. No sir.
Q. Do I understand he only received this one injection of serum was given while you were there?
A. No, not one, he received about maybe thirty.
Q. He received about thirty?
A. Yes sir.
Q. And after those thirty treatments, were they all of the same character and administered in the same way?
A. Yes, sir.

Same objection.
Overruled.
Exception.

Q. This first examination I presume was a careful examination by Dr. Prather of your husband?

Same objection.
Overruled.
Exception.

A. Yes sir.
Q. In addition to the serum treatments referred to, did your husband take some baths at Excelsior Springs?
A. Yes sir.
Q. Did Dr. Prather recommend to him that he take those baths?
A. Yes sir.
Q. How frequently did he take the baths?
A. About one or two a week.
Q. Relative to those baths that I have referred to, do you know whether or not in taking them, your husband had an attendant who looked after him and [assistant] in giving the bath?
A. They always have down there.
Q. Where were those baths taken?
46 A. Right in the city there.

Q. What kind of a building or place?
A. Well, it was a private place, or rather public place, where they all took baths.
Q. Who if you know was in charge of that place?

Plaintiff objects as irrevelant and immaterial.
Overruled.

A. I cannot just think about the name.
Q. Was it a place Dr. Prather operated and had charge of do you know?
A. No sir.
Q. Were there others there at this particular place, taking baths there?
A. Yes sir.
Q. Were there people who were lame there, taking baths?

Plaintiff objects as irrelevant and immaterial, and for the further reason that the record shows that no attempt was made to contest this policy, for fraud, ill health or misrepresentations within the two years contestable period, therefore the testimony would be irrelevant and immaterial.
The Court: I think I will sustain that objection.
Mr. Struble: Upon all of the grounds stated?
The Court: Yes.

Q. How long did it take to administer one of these baths if you know, to your husband.

Plaintiff objects as irrelevant and immaterial, and on all the other grounds urged in the last objection.
Overruled.
Exception.

A. About half an hour.
Q. Did your husband stay at this place where these baths were given, over night?
A. No sir.
Q. Was it a place where provision was made for people staying over night if you know?
A. No sir.

Plaintiff objects as irrelevant and immaterial.

Q. You are acquainted with Dr. Clingan?
A. Yes sir.
Q. As he was the family physician of your family for a number of years?
A. Yes sir.
Q. How long had you known him?
47 A. Ever since I was in Sioux City.
Q. Was he the doctor whom you and your husband and family usually consulted or called when there was any illness in the family?
A. Yes sir.

Cross-examination:

Q. Where did you reside when your husband was operating the packing house?
A. Down on Chambers street.
Q. Where, with reference to the packing house?
A. Next to the packing house.
Q. Well, about how far away were the two buildings?
A. About a block.
Q. How long had you lived there with Mr. Hurni?
A. About three years.
Q. Then you moved where?
A. Morningside.
Q. How long before his death did you move to Morningside?
A. About ten years.
Q. Morningside is about how far from the packing house?
A. About a mile.
Q. Did you have occasion to go to the packing house occasionally?
A. Yes sir.
Q. When you were living near the packing house did you have occasion to go into the packing plant?
A. Yes sir.
Q. Dr. Clingan was your family physician?
A. Yes sir.
Q. Had been for a great many years?
A. Yes sir.
Q. Treated you when you were sick?
A. Yes sir.
Q. And the children?
A. Yes sir.
Q. How many children did you have?
A. Four.
Q. Do you remember about what time in the year it was you went to Excelsior Springs?
A. 1914.
Q. What time of the year?
A. In May.
Q. You think you were there about three months?
A. Yes sir.
Q. Who went with you?
A. The children.
Q. All four of the children?
A. Yes sir.
Q. And you and Mr. Hurni?
A. Yes sir.
Q. When you went down there, what place did you go to, did you start housekeeping down there?
A. Yes sir.
Q. Kept house during all the time you were there?
A. Yes sir.

Q. What did Mr. Hurni do while he was there?
A. Oh, he went out for a walk, and sat around home.
Q. Go to the springs and drink water occasionally?
A. Yes sir.
Q. Was this apartment or house in which you lived, connected in any way with the hospital or sanatarium?
48 A. No sir.
Q. Owned by some private individual?
A. Yes sir.
Q. Was it a separate house, or larger house?
A. No, it was a separate house.
Q. Had you known this Dr. Prather before?
A. No sir.
Q. Before Mr. Hurni went down there, what had he been doing?
A. Well, working as usual at the packing house.
Q. Did he go to his work right up to the time he left for Excelsior Springs?
A. Yes sir.
Q. Went regularly did he?
A. Yes sir.
Q. Before he went down there, what had he been complaining about his health, any?
A. Why just a little cold.
Q. How frequently did he have a cold?
A. Oh, three or four times a year.
Q. Well, just at that particular time, before going, had he been complaining about his health?
A. No.
Q. Did he complain about his health when he was down there?
A. No sir.
Q. Was he confined to the house while he was down there?
A. No sir.
Q. Did he come back home during the three months' period?
A. Yes sir.
Q. About how long was he gone each time he came back?
A. About a week at a time.
Q. About how many times did he come back?
A. Three times.
Q. Do you know what he came back for?
A. To look after his business.
Q. Do you know what kind of a practice this Dr. Prather had?
A. No sir.
Q. Did you know anything about him before you went down there?
A. No sir.
Q. Do you know whether or not he was a regular physician?
A. Yes sir, he was a regular physician.
Q. These injections you speak of, do you know anything about what the character of fluid was injected into the arm?
A. Why, he said it came from a goat?

Q. Goat treatment?
A. Yes sir.
Q. Did you take any of the goat treatment?
A. Yes sir.
Q. Did you take it out of the same bottle it was taken out of for him?
A. Yes, sir.
Q. Administered the same time, or about the same time it was administered to Mr. Hurni?
A. Yes sir.
Q. Did you take as many treatments as he did?
49 A. Yes sir.
Q. Had you been sick before that?
A. No sir.
Q. Were you sick at that time?

Defendant objects as incompetent, irrelevant, immaterial, not cross-examination.
Sustained.

Q. Did you take the baths at the same time?
A. Yes sir.
Q. State if you know whether or not all persons going down there, and remaining and using the water, are required to get a certificate of a physician before they drink the water, answer that by yes or no?
A. Yes sir.

Mr. Reed: I would like to interpose an objection to the answer as incompetent, irrelevant, immaterial, and not proper cross-examination.
The Court: It is obviously leading to something else, she may answer the question.
Exception.

Q. Did they all go and get certificates from some doctor?
A. Yes sir.
Q. Or physician there, before they can drink the water?
A. Yes sir.

Defendant objects for each of the reasons last stated.
Overruled.
Exception.

Q. After the expiration of this three months' period you were down there, where did you and Mr. Hurni go?
A. Back home.
Q. Mr. Hurni go back to his work just as before?
A. Yes sir.
Q. What was his work around the packing house?
A. Why looking after the men.
Q. Buy the stock?
A. Yes sir.

Q. Did his duties require him to be out and in from the packing house?
A. Yes sir.
Q. Where is the office of the packing house with reference to the killing floor, with reference to the rest of the building, is it part of the building, is it enclosed all in the same building?
A. Yes sir.
Q. Where is this building, with reference to the office, were the killing operations carried on?
A. Next to it.
50 Q. In answer to questions propounded to you by counsel you said he consulted a physician. Did you ever hear Mr. Hurni use the word consult?
A. No sir.
Q. Do you know whether or not he knew what the word consult meant?

Defendant objects as incompetent, irrelevant, immaterial.
Not proper Cross-Examination.
Sustained.

Q. Did you ever hear Mr. Hurni use the word prescribe?

Defendant objects as incompetent, immaterial, irrelevant, not proper cross-examination.
Overruled.
Exception.

A. Yes sir.
Q. When and in what connection?
A. Oh I don't know just in what connection.
Q. Did he use it very frequently?
A. No sir.
Q. Could Mr. Hurni read or write?

Defendant objects as incompetent, irrelevant, immaterial, not proper cross-examination.
Sustained.
Witness excused.

Dr. C. G. Gibson, recalled for the defendant, testified as follows:

Q. Doctor, had you known at the time that you issued the certificate of health and recommended Hurni to the defendant company as a fit applicant for insurance, that he had within five years previous, consulted Dr. Clingan, and had been treated by Dr. Clingan, and prescribed for by him, and that likewise Hurni had consulted Dr. Bogart at Excelsior Springs, and Dr. Prather of the same place and that he had been treated by Dr. Prather, would you have issued the certificate of health, or recommended him to the defendant as a fit applicant for insurance?

Plaintiff objects for the reason that if it is intended to elicit from this witness any fact or opinion bearing upon the establishment as

a defense of fraud or misrepresentation on the part of Mr.
51 Hurni or the fact, if it be one, Mr. Hurni was not in good health at the time the policy was issued, it is irrelevant and immaterial, in view of the fact that the defendant has failed, as shown by the record, to contest the policy within the two years incontestable period. On the further ground this question is objected to for the reason that it is assuming facts not shown by the record, that it is assuming that Mr. Hurni did consult a physician with reference to a complaint or sickness which would be material to the risk, whereas as a matter of fact, the testimony shows, if it shows anything, that the sicknesses for which he consulted a physician if any were consulted, were merely temporary ailments, and not such sickness as contemplated by the medical examination, and the question is therefore irrelevant and immaterial. For the further reason that it is simply a self serving declaration or statement upon the part of the witness, calling for a conclusion of the witness and no statement of fact.

Overruled.

Exception.

A. No sir.

Cross-examination:

Q. Doctor, you are and have been for a number of years, the examining physician for the defendant Mutual Life of New York?

A. Yes sir.

Q. You are acquainted with Dr. Clingan I presume, the doctor who preceded you on the witness stand?

A. Yes sir.

Q. Heard his testimony given this morning?

A. Part of it.

Q. About how long a time were you in making the examination of Mr. Hurni for this policy?

A. Oh, I should say probably three quarters of an hour.

Q. The examination, and the writing out of the answers to these questions and so forth, consumed about an hour?

A. Yes sir.

Q. Who brought Mr. Hurni to your office for the examination?

A. Why I cannot recall the gentleman's name, I think he was an agent of the company.

Q. Was it Mr. Rose?

A. I think that is the name.

Q. And he was one of the solicitors of the company?

A. That is my understanding.

Q. Did he remain in the office, I don't mean in the room where the examination was conducted, or go into the reception room?

A. Yes, I think he did.

52 Q. Remained while you were examining Mr. Hurni?

A. Yes sir.

Q. And went out with Mr. Hurni?

A. Yes.

Q. Now in the course of this hour, I assume you had considerable conversation with Mr. Hurni?

A. Very likely I did.

Q. Took all the time as you naturally would, from that conversation, you got his history did you not, I mean his medical history?

A. Tried to, anyway.

Q. So, that of course, you wouldn't have the jury understand that these answers written down were the only questions propounded to Mr. Hurni?

A. Yes, they probably are.

Q. And the answers were the only answers he gave?

A. Yes sir.

Q. Well, what were you talking about the rest of the time?

A. That is past history, I don't know.

Q. Now to get at the matter, there is some reference in this report to the case of pneumonia which he had some years previous. Now would you have the jury understand the only conversation you had with Mr. Hurni in regard to that sickness, was just the question and answers which appear in this report, to which you have referred?

A. I would say in substance it probably is.

Q. In other words, in your conversation, learning the history of that case, and his recovery you put down there the substance of it in these questions and answers?

A. The answers there are in substance the answers he gave to questions asked.

Q. Did he tell you in that conversation, who the attending physician was?

A. I don't think so.

Q. You didn't know from that conversation who attended him in his illness?

A. No sir.

Q. You knew Dr. Clingan I assume at the time?

A. Yes sir.

Q. Did you know that Dr. Clingan was a friend of the family, or physician of the Hurni family?

A. No I did not.

Q. Did you know Mr. Hurni at that time?

A. Not personally.

Q. You knew him by sight?

A. Yes sir.

Q. And of course knew what business he was engaged in, and where his place of business was located?

A. Yes sir.

Q. You knew he had a packing plant down by the yards?

A. Yes, sir.

Q. And you had known him for some time by sight?

A. No, I had not.

53 Q. When first did you become acquainted with him sufficient to know him when you saw him?

A. He probably had been pointed out to me, who he was.

Q. I say, about how long previous to that?
A. Oh, I don't know, it may have been several years.
Q. That is what I asked a few minutes ago, you knew Mr. Hurni by sight for some years prior?
A. Yes sir.
Q. So when you would meet him upon the street, you would know it was Mr. Hurni?
A. Probably would.
Q. You had at least that much acquaintance with him; now in examining applicants for life insurance doctor, it isn't your practice to note what might be termed minor ailments?

Defendant objects as not proper cross-examination.
Overruled.
Exception.

A. It all depends upon what you call minor ailments.
Q. Well for example, in examining an applicant, or this applicant you discover that some years previous he had a cold, and a doctor had prescribed for him, would you consider that an ailment which should be noted?

Defendant objects for each of the reasons last stated.
Overruled.
Exception.

A. I certainly would, if it was serious enough to call a physician.
Q. You mean to say then, in all cases where you make an examination of this kind for applicants, that you note every prescription given to the applicant within the two year period, regardless of what it is?
A. We try to get a history of it.
Q. You try to get a history of them?
A. Yes sir.
Q. Well now, if the history of that would disclose a man had a cold, not confined to his bed, and instead of going to the druggist for some cough medicine, he had a doctor prescribe, would you note that on your policy?
A. Very likely would.
Q. Well, do you always do that?
A. I am supposed to.
Q. It is not a question what you are supposed to, do you always do that?
A. I think I do.
Q. That is the rule?
A. Yes sir.
Q. That is — the insurance company requires?
A. That is one of the rules.
Q. And therefore, you always comply with the rule?
54 A. As near as I can.
Q. What do you now mean by as near as you can?
A. If a man says he had a cold, for instance, and he has not been in bed, and he had been what he calls indisposed for a couple

of days, and consulted a physician and can satisfy me that there is nothing to that, why I may pass it over. If he cannot I make a note of it, and if it has been within five years I am supposed to record the physician's name consulted, and that is left to the state examiner to ask what questions he pleases regarding it, it is taken out of my hands altogether.

Q. You consider, if you consider it of no consequence, you may pass it over?

A. I may pass it over.

Q. And isn't it true on occasions you do pass it over?

A. Not very often.

Q. Do you sometimes?

A. I presume I do.

Q. What I mean is, that physicians in making examinations of this kind, and yourself, don't always actually note every consultation which the applicant had with a physician?

A. If it is within the last five years from the time of the examination, they are noted, if the patient gives the name of the physician.

Q. Regardless?

A. Regardless of what is the trouble.

Q. Supposing for example, the applicant happened to be one of your patients, and four years previous, you had given him a prescription for a cold, some cough medicine for a cold, would you note that in answer to these questions, one of those questions named here?

A. I likely would, yes sir.

Q. And you always do?

A. I try to.

Q. If you had discovered in this examination, that Mr. Hurni had had one prescription from Dr. Clingan for a cold in 1911, would you have noted that in your examination?

A. I think I would.

Q. So that you feel if Mr. Hurni had told you he had had a cold some four years previous and took some medicine for it, you would have noted that in the application?

A. Very likely.

Q. You testified at the last trial of this case did you doctor?

A. Yes sir.

Q. Let me ask you if this question wasn't asked: "For example, if a person would tell you he had had a cough four years previous and taken a little medicine for it, would you consider that a matter really of note." And did you answer this way, "Not especially so, no sir."

55 A. Very likely.

Q. That is the way you felt about it at that time isn't it?

A. That is a question you are asking there different from the one you are asking before.

Q. And to refresh your recollection doctor, wasn't this question asked and didn't you make this answer?: "And in your practice, as an examiner for the company, you would not note little matters of that kind," and did you not answer, "No sir."

A. I probably did, I don't know.

Q. So as a matter of fact doctor, you are supposed to, and do use your discretion in matters of that kind?

A. No sir.

Q. You do not use any discretion at all?

A. Whenever a physician is consulted we are supposed to note that, if medicine is taken without it, without the consultation of a physician, we note nothing of it.

Q. Q. You do not use any latitude or professional judgment at all in prop-unding these questions, and taking answers to them?

A. I don't know as I understand what you mean.

(Question read.)

A. These questions here are all put in form, and we ask them, and record the answers as they are given.

Q. In other words, you would have this jury understand, that in the propounding of that list of questions, and taking the answers, a layman could as well do that as a physician?

A. He might.

Q. You are not permitted to, and as a matter of fact you do not exercise any profession- judgment or discretion at all in the matter of taking these answers?

A. That all depends on what the company thinks about it.

Q. I am asking what you think about it, because you are the one conducting the examination.

A. I am placed there for that purpose.

Q. And you merely record the answers in the exact language that the patient gives them to you?

A. Not always?

Q. Well, you did so in this case, didn't you.

A. In substance, I presume it is.

Redirect examination:

Q. Dr. Gibson, in propounding these questions under the heading "Statement of Medical Examiner," you are instructed and do act as a recording agent there do you not, that is to the extent that you are supposed to at least write down the answers that are given, is that true?

56 A. In a way, we are supposed if the patient cannot put his language in medical terms, so they can be easily written, we may change a word here and there, but not affecting the meaning.

Q. Now Mr. Stillwell inquired about using your own professional knowledge. You either do or do not certify an applicant as a fit subject for insurance when you have completed your part of the work, you either certify them or do not, is that true?

A. Yes sir.

Plaintiff objects as not proper redirect.

Overruled.

Exception.

Q. Now in determining whether or not you certify the applicant as a fit subject for insurance, you exercise your own professional judgment do you not?

Same objection, the witness not having been interrogated as to his certificate and it is not part of the examination.

Overruled.
Exception.

A. Yes sir.

Q. Now in this particular case, when you certified Hurni as a fit subject for insurance, state whether it was a determination reached by you, exercising your professional judgment, and being guided by the past history of the applicant as disclosed by his statement to you, and the physical examination you made of him?

Plaintiff objects as not proper redirect examination, irrelevant, immaterial, calling for a conclusion of the witness and for the further reason that in so far as it attempts to establish the defense of fraud, ill health or misrepresentation, the record shows that the defense was not set up within the two years contestable period.

Overruled.
Exception.

A. It was.

Witness excused.

Mr. Reed: Now in connection with the testimony of the witness Dr. Gibson, the defendant offers, introduces and reads in evidence the application Exhibit B.

57 Mr. Stason: Objected to in so far as it is offered in evidence, the part of it relating to questions and answers which have been set up here in the answer as a defense on the ground of fraud, misrepresentation and ill health, and to that extent it is objected to for the reason that it is incompetent, irrelevant, immaterial, in view of the record in this case, that no effort was made to contest the policy within the two years contestable period and therefore is irrelevant, immaterial, under the issues.

Overruled.
Exception.

Mr. Reed: If your Honor please, by agreement of parties we desire to offer and read in evidence the testimony of F. A. SPENCER on behalf of the defendant as a deposition. The matter is more or less perfunctory but we want to introduce it.

The Court: Very well.

(Mr. Reed reads testimony which is as follows):

"Q. You may give your name to the reporter.
"A. F. A. Spencer.

"Q. What is your occupation?
"A. Life insurance.
"Q. For what company?
"A. The Mutual Life of New York.
"—. Do you have any particular territory or district?
"A. The western seventy seven counties of Iowa.
"Q. What is your designation or title?
"A. My official title is manager.
"Q. Do you mean to say you look after the business of the Mutual Life for the West 77 counties of Iowa?
"A. Yes sir, completely.
"Q. All the insurance business or business of the company is handled by you or through you for those west 77 counties? A. Yes sir.
"Q. And you look after the business?
"A. The whole business.
"Q. How long have you been so occupied?
"A. In this state?
"Q. Yes sir.
"A. Eight years.
"Q. How long have you been with the Mutual Life of New York?
"A. Between nineteen and twenty years.
"Q. Where is its home office?
"A. New York City.
58 "Q. Has it always been there.
"A. For seventy six years.
"Q. Have you been in the Home Office?
"A. Frequently.
"Q. How often do you mean by that?
"A. Sometimes four times a year, sometimes twice a year, and sometimes three times a year, and always once a year.
"Q. And you are familiar, I suppose, with the workings of the Home Office, the mechanical process of the Company in the way of handling the insurance business?
"A. In everything except the actuary department.
"Q. What is that?
"A. That is difficult to answer, where they formulate the figures.
"Q. Do the actuaries have anything to do with the handling of a policy that may be written?
"A. Yes sir, in one particular only, the question of the policy, do you want me to tell you that?
"Q. Yes sir.
"A. There is in the Mutual Life what is known as a committee which meets every day at 11:00 o'clock.
"Q. I do not want to take up those matters.
"A. The actuary is one of that committee.
"Q. You are familiar with the general run of the business?
"A. Yes sir, absolutely so.
"Q. I wish you would tell the jury and the court the process of taking an application and writing a policy, the first step in taking an application.

"A. It must be written by the agent first.
"Q. The soliciting agent?
"A. Yes, sir.
"Q. The Company furnishes a form for that?
"A. Yes sir, on the company form.
"Q. Would the company accept any form but its own?

Mr. Stillwell: That is objected to as incompetent and immaterial to anything in this case.
Mr. Reed: It is merely preliminary.
"Q. After the application is made or taken by the soliciting agent, what is the next step?
"A. He is taken to the examining doctor.
"Q. When the examining doctor has passed on the application, then what next becomes of the application?

Mr. Stillwell: That is objected to as incompetent and immaterial to anything in this case.
59 The Court: He may answer the question.

"A. It is sent to my office.
"Q. Where is your office?
"A. In Des Moines.
"Q. Where was your office in 1913?
"A. In Des Moines, Iowa.
"Q. Then after the application reaches Des Moines what is done with it?

Mr. Stillwell: The plaintiff objects as incompetent, immaterial, irrelevant and not confined to the particular application in controversy.

"I will confine it to the particular application in controversy; what was done with the application of Rudolph Hurni after it reached your office, if you know?
"A. At first it was kept among our records.
"Q. And a copy made of it?
"A. Yes sir.
"Q. Then what was done with it?
"A. After the copy was made and passed upon by the medical referee it was forwarded to New York.
"Q. To the Home Office?
"A. Yes sir.
"Q. Where was the policy sued upon in this case written?
"A. In New York City.
"Q. That is following the usual custom, they are all written there?
"A. Yes sir.

Mr. Stillwell: That is objected to as incompetent, the witness has not shown himself competent to testify.
The Court: Does he know what was done with it?
Mr. Reed: I will withdraw the question.

"Q. Did the policy sued upon in this case come back to you or to your office after it was prepared in New York and before it was delivered?

"A. Yes sir.

"Q. Is that the usual custom?

"A. All policies come to my office.

"Q. You mean in your territory?

"A. Yes sir.

"Q. Was it eventually delivered by you or through your office to Mr. Hurni?

"A. No sir, it was sent to the agent, Mr. Rose.

"Q. It was delivered to him?

"A. Yes sir.

"Q. You are in charge of the office at Des Moines?

"A. Yes sir.

"Q. And the business is transacted by you or persons under your direction?

"A. Yes sir, and under my name.

"Q. Have you any recollection of a case of Rudolph Hurni coming into your office?

"A. No sir.

60 "Q. Can you state of your own personal knowledge whether or not the Mutual Life Insurance Company of New York, the defendant in this case, relied upon the statements in the application made Mr. Hurni, as to being truthful?

Mr. Stillwell: That is objected to as incomptent, the witness having shown that he was not at the Home Office, and it appearing from his testimony that the policy in question was issued at and by the Home Office, of which he was not a part and was not present at the time.

The Court: I think the objection is well taken.

Sustained.

"Q. State what authority you have in relation to policies which have been sent to the Home Office to be written up and sent back to you for possible ultimate delivery in your territory.

Mr. Stillwell: The plaintiff objects same as last above.

The Court: That calls for his authority, if you want to cross-examine as to the source of that authority you can do so.

Mr. Stillwell: Please note an exception.

"A. The policies come to me before being delivered to the agent, and if I know of any reason whatsoever, any knowledge comes to my possession between the time the application has been forwarded to New York, and the policy comes back that would cause what the company under its standard calls on me to impart. I would violate my instructions and probably lose my position with the company if I delivered it to the agent, unless I reported to the company. I must absolutely hold up the delivery of the policy to the agent until everything is free and clear.

"Q. Had you any knowledge or information at any time until after the death of Rudolph Hurni, that any of the statements made by him in the application were not true?

Mr. Stillwell: That is objected to as immaterial and incompetent, in that it assumes a state of facts not shown to exist in this case.

The Court: He may answer it.

Mr. Stillwell: Please note an exception.

"A. I had no knowledge, no, sir.

"Q. In respect to the re-dating of the policy in suit, the evidence shows *that* the application to have been dated on the 2nd day
61 of September 1915, and the policy when issued was dated on or about the 23rd day of August 1915. Will you explain that to the Court and jury, if you can, if you know the reasons of that?

"A. I know the custom of the company in that matter until the first of January of this year. That custom has been done away with by the ruling of the insurance commissioner of the State of Iowa. Prior to that time privilege had been extended to all applicants to have their policies dated back six months, or dated forward six months if they preferred, or dated back six months, for the purpoes of getting a lower premium on account of lower age. The application showed the date of the examination, but the policy was dated back so he came within six months of his birthday. This man's birthday was some time in February, and if the policy had been issued under the date of September without being dated back, he would have been rated a year older than he was rated. But having paid for the few days insurance that he did not get, he had the advantage of age of forty-seven years instead of forty eig*th* years, which had he lived twenty years would have made a considerable item.

"Q. That privilege of antedating the policy was endorsed on the application?

"A. Yes sir, and on the policy also, I think.

"Q. Was this particular policy antedated in pursuance of that?

"A. It certainly was.

Mr. Struble: The defendant now offers, introduces and reads in evidence a stipulation signed by the parties hereto, filed October 20th, 1920, in this cause, and having been marked by the reporter Ex. C and also the exhibits attached to and made a part of the said stipulation.

Plaintiff objects insofar as the exhibits attached thereto are concerned, on the ground that the same are incompetent, irrelevant, immaterial, the objection of incompetency not being urged on the grounds that they are copies in any respect but on the grounds that they do not tend to show that the defendant did in fact contest the policy within the two year incontestable period as provided for by the terms of the policy itself.

Overruled.

Exception.

62 Mr. Struble: It is stipulated between the parties that on November 12th, 1917, the defendant company duly tendered to the Hurni Packing Co., and Minnie B. Hurni, executrix of the last will and testament of Rudolph Hurni, deceased, the sum of $2,150 being the amount of premiums paid to the defendant on policy No. 2,251,875 together with interest thereon at the rate of 6% from the time of payment thereof to the date of said tender.

Defendant rests.

Mr. Stillwell: The plaintiff offers and reads in evidence the deposition of H. E. Rose, taken before a commissioner appointed for that purpose by this Court, and filed with the clerk of this court on the 26th of May 1920.

During the reading of the deposition the following objections, exceptions and rulings were made:

By Mr. Stason:

"Q. Where do you reside Mr. Rose?
"A. Dixon Hotel, Kansas City.
"Q. How long have you lived in Kansas City?
"A. Three months.
"Q. I will ask you to state whether or not at one time you lived in Sioux City, Iowa.
"A. I did.
"Q. During what period?
"A. In 1903 to 1915.
"Q. In 1915 what business were you engaged in?
"A. District manager for the Mutual Life Insurance Company of New York.
"Q. With your office at what place?
"A. Sioux City, Iowa.
"Q. I will ask you to state whether or not you knew Rudolph Hurni?
"A. I did.
"Q. How long had you known him?
"A. For about ten years.
"Q. Prior to your going to work as District Manager of the Mutual Life Insurance Company in New York, what business were you engaged in?
"A. I was with the Northwestern Mutual for three years prior to that.
"Q. Were you at any time employed by any of the packing companies of Sioux City?
"A. Armour & Company.
"Q. I will ask you to state whether or not while you were employed by Armour & Company you became acquainted with Mr. Hurni?
"A. Yes, it was while I was employed by Armour.
"Q. He was engaged in what business at that time?

33 "A. Independent packer.
"Q. Did you, in 1915, know of any of the other officers of he Hurni Packing Company?
"A. I knew Frank Gale and John Buckley. I believe they were officers of the company.
"Q. Had you known them for any period of time?
"A. I had known Mr. Buckley for about eight or ten years.
"Q. And Mr. Gale, how long had you known him?
"A. Just a short while, possibly a year or two.
"Q. State whether or not in the latter part of August or the early art of September you interviewed Mr. Hurni with reference to having him take a policy of insurance in your company?
"A. I did, yes.
"Q. Do you remember, without giving the date, the fact that on particular date he was examined by the examining physician of he Mutual Life?
"A. Yes.
"Q. Had you seen Mr. Hurni before that with reference to life nsurance, before that date?
"A. Not before the date I wrote him, no sir.
"Q. Where did you interview him that day?
"A. In his office at the packing house.
"Q. What officers or persons actively associated with him were resent at the time?
"A. Mr. Gale and Mr. Buckley were the only ones that I knew.
"Q. Do you recall about the time of day you went there?
"A. About 11.30 a. m.
"Q. Do you know whether or not at that time he had been solicited y any other life insurance agent?

Mr. Reed: Just a minute; it is stipulated and agreed by and between the parties to this cause, by their respective counsel, that objections to the competency, relevancy or materiality of any or all of he testimony of the witness Rose may be made, if desired, at the me the same is offered and read in evidence on the trial of this se; that to expedite the taking of the deposition at this time no bjections need be urged; however, either party may make objecons at this time, if desired.

Objected to on trial as not proper rebuttal.
Overruled.
Exception.

"A. I understand that he had, by several. I answer that way ecause that is all I knew, is that he had been.

Motion to strike answer and question for same reasons as in objection.
Overruled.
Exception.

"Q. Was your understanding reached from any thing that Mr. urni told you at the time?

Same objection, ruling and exception.

"A. In presenting my proposition, the premium on the policy based on the ordinary life plan ran something over a thousand dollars and Mr. Hurni remarked that it was considerably [high-] than the other boys had offered him.

Same motion to strike, ruling and exception.

"Q. You haven't answered the question. Just read the question.

(Last question read by the reporter.)

"A. That is just what I said.
"Q. That calls for an answer yes or no, Mr. Rose.
"A. Yes.
"Q. Now, state if you recall what he said with reference to offers of insurance made to him by other agents, if anything.

Objected to as incompetent, irrelevant, immaterial and not proper rebuttal.

"A. In presenting my policy on the ordinary life plan, the premium ran something over a thousand dollars, and Mr. Hurni remarked that it was considerably higher than policies offered by some of the other men.

Motion to strike answer and question for same reasons as in objection.
Overruled.
Exception.

"Q. How long did your interview with Mr. Hurni at that time last?

Same objection, ruling and exception.

"A. About twenty minutes.
"Q. Can you state now what was said by you to him with reference to his taking insurance? If so, state.

65 Objected to as incompetent, irrelevant, immaterial not proper rebuttal.
Overruled.
Exception.

"A. Well, as I remember it, after reaching Mr. Hurni's office on this particular morning he was just about ready to go out into the packing house with some other men, and I said to him, more in a [josh-ing] way than a business way; "You're a fine fellow to figure on $25,000 insurance and not let me in on it:" he remarked that the deal had not been closed yet, and if I had anything to show him, why, show it to him; so I said, "Your about 43 aren't you Mr. Hurni," and he said "No, I am forty-seven." I passed a remark that he certainly did not look that old and as long as I had known him I thought he was a much younger man. However, I would

present some figures to him as soon as he came in from the packing house.

"Q. Did you present the figures to him?

Same objection, ruling and exception.

"A. I did.

"Q. And state if you can what statement you made to him with reference to the policy that you were endeavoring to sell him.

Same objection, ruling and exception.

"A. I drew up what is known by life insurance companies as a ledger statement for corporation policies for $25,000 on the ordinary life plan at Mr. Hurni's age. After showing the statement to him on his return he remarked that it was considerably higher premium than others, but in explaining to [he] and Mr. Buckley that the premium decreased through the provision of the dividends from year to year, and that this style policy had a cash value, it wasn't hard to convince both he and Mr. Buckley as well as Mr. Gale, of the logic of this style policy as against the term insurance that the other companies had been offering him.

Motion to strike answer for reasons is urged in objection.
Overruled.
Exception.

66 "Q. Did he state how much the premium was on the other insurance that had been offered him?

Same objection, ruling and exception.

"A. As I remember it, he said something about it being around $600.00.

Motion to strike answer for reasons urged in objection.
Overruled.
Exception.

"Q. While you were there, did he have any conversation with the other officers of the company with reference to the policy, if you know, and if so, state.

Same objection, ruling and exception.

"A. He turned to Buckley and said 'What do you think about it, John?' and Mr. Buckley said he thought it was the better policy of the two kinds that had been offered.

"Q. State what he finally said with reference to taking the policy if anything.

"A. Why, after Mr. Buckley passed that remark I asked Mr. Hurni when he would be examined.

"Q. What did he say?

"—. He said 'tonight.'

"Q. State whether or not you made arrangements for his examination and if so with [him].

"A. I asked him what time would be convenient and he said shortly after six o'clock, so knowing that our chief examiner, Dr. Cremin was not available, I arranged to meet Mr. Hurni in Dr. Gibson's office at 6:30 that evening.

"Q. Did you meet him there?

"A. I did.

"Q. State, if you know, whether or not he was examined by Dr. Gibson at that time for this policy?

"A. Yes, he was.

"Q. Were you present during the examination?

"A. I was in the doctor's reception room.

"Q. Were you there when Mr. Hurni came out of the examination room?

"A. I was.

"Q. State what, if anything, was said by Mr. Hurni or Dr. Gibson at that time?

"A. Being interested in the outcome of the policy I asked the doctor how Mr. Hurni looked and he said all right.

"Q. Do you know whether or not the policy for which he was then being examined was finally delivered to Mr. Hurni or to the packing company?

67 "A. To the best of my knowledge it was. There was a policy delivered. That is the only examination I know of.

Mr. Reed: The defendant moves to strike all of the testimony of the witness Rose, renews its motion to strike as made, and now moves to strike all the testimony of the witness Rose as incompetent, irrelevant, immaterial, pertaining to no issue in this case, and not proper rebuttal testimony.

Mr. Stillwell: I will read the cross-examination then, your Honor.

The Court: Very well.

(Cross-examination read as follows:)

By Mr. Read:

"Q. How did you become advised that Mr. Hurni was in the market for insurance, if you did so become advised?

"A. Through a friend of mine who was aware that they were figuring on taking a policy.

"Q. What was his name?

"A. J. B. Alexander.

"Q. What was his occupation at that time?

"A. Vice president of the National Bank of Commerce.

"Q. And it was following Mr. Alexander's suggestion, was it, that you went down to see Hurni?

"A. It was.

"Q. Now, you accompanied Hurni to Dr. Gibson's office?

"A. Yes sir.

"Q. And that was for the purpose of having him examined by Dr. Gibson, was it?

"A. Yes.

"Q. Dr. Gibson was one of the examiners for the Mutual Life Company at that time, was he?
"A. Yes sir.
"Q. You didn't see the examination made?
"A. I did not, no sir.
"Q. That took place, did it, in the examination room?
"A. Yes, sir.
"Q. You were in the outer office?
"A. Yes sir.
"Q. Were you an intimate acquaintance of Hurni's?
"A. Why, not exactly an intimate acquaintance, but I have known him fairly well for a period of ten years.
"Q. Saw him every day?
"A. Every day, yes sir.
"Q. And he, himself, never mentioned this matter of taking insurance to you, prior to the time you went to see him as you have related?
"A. No sir."

Mr. Reed: I renew the motion to all the testimony.
The Court: The ruling will be withheld for a while.

68 FRANK E. GALE, called on behalf of the plaintiff in rebuttal, first being duly sworn by the Clerk of Court, testified as follows:

Q. Give your full name to the reporter.
A. Frank E. Gale.
Q. Where do you reside?
A. Sioux City.
Q. How long have you lived here?
A. 33 years.
Q. What business are you engaged in?
A. At the present time?
Q. At the present time.
A. Packing business.
Q. How long have you been interested in the packing business?
A. 25 years.
Q. Did you know Rudolph Hurni in his lifetime?
A. Yes sir.
Q. How long did you know him?
A. Oh, at least 20 years.
Q. Were you associated with him in any way prior to the time you began to work for the Hurni Packing Co.?
A. No sir.
Q. How long had you been employed by the Hurni Packing Co. before Mr. Hurni's death?
A. Well probably five years, four years and nine months.
Q. Were you interested in the corporation?
A. Yes sir.
Q. What official position, if any, did you hold?
A. I was manager of the plant.

Q. Were you also an officer of the corporation?
A. Yes sir.
Q. What officer?
A. [Vive] president.
Q. Who were the other officers of the corporation?
A. Mr. Hurni was the president, Mr. J. W. Buckley secretary and Charles Selzer treasurer.
Q. And yourself vice president?
A. Yes sir.
Q. Do you remember the fact that in the summer or fall of 1915 the policy of insurance was written on the life of Mr. Hurni?
A. Yes sir.
Q. At that time were you regularly and actively employed down there at the plant?
A. Yes sir.
Q. Your duties were what in connection with the plant?
A. Well, in the sales end of it practically.
Q. Were you when on duty, most of the time in the office?
A. Yes sir.
Q. What work did Mr. Hurni do?
A. He did the buying of live stock.
Q. In connection with his duties as buyer, was he in the office pretty frequently during the day?
69 A. Yes, he was in and out.
Q. Where was Mr. Buckley employed, where were his duties performed?
A. In the office entirely.
Q. State whether or not you were a member of the board of directors about the time this insurance was taken out?
A. Yes sir.
Q. Who were the other officers on the board?
A. The officers were the directors.
Q. Do you recall the matter of taking out an insurance policy on the life of Mr. Hurni and payable to the company was under consideration for any period of time before the policy was written?

Defendant objects as incompetent, irrelevant, immaterial, to any issues in this case, and not rebuttal testimony.
Overruled.
Exception.

A. Yes it was.
Q. About how long a period of time was the matter of writing this insurance or taking out this policy under consideration by the officers?
A. I would say three to four months.
Q. Without stating what was done, was it taken up and discussed in the board meetings?

[*Dame*] objection.
Overruled.
Exception.

A. It was.
Q. Did you know Mr. H. E. Rose?
A. I did.
Q. How long had you know- him?
A. Possibly a year.
Q. What business was he engaged in?
A. Insurance business.
Q. Do you know what company he represented?
A. I know from hearing the testimony, the Mutual of New York.
Q. You know a policy was subsequently taken out by the corporation?
A. Yes sir.
Q. Was it taken out through his agency?
A. Yes sir.
Q. Do you recall Mr. Rose being down there at the plant, at or about the time when this policy was taken out?
A. I do.
Q. How frequently was he down there?
70 A. I never saw him there but once.
Q. Did you hear any of the conversation had between Mr. Rose and Mr. Hurni at that time?
A. I did not give any particular attention, no.
Q. Do you recall any of the conversation?
A. No I don't.
Q. Do you know what the conversation was about?
A. I do.
Q. What was it about?
A. About taking out a policy.
Q. What did they do?
A. To the best of my recollection, they left there in a car, automobile.
Q. You don't know of course, where they went?
A. I don't know where they went.
Q. Did they come back later?
A. Mr. Hurni came back later, alone.
Q. Was that just at the time, or about the time of taking out this policy?
A. It was.
Q. State whether or not the officers of the company had under consideration the offers, in the way of policies, by other insurance agents.

Defendant objects as incompetent, irrelevant, immaterial and not proper rebuttal testimony.

The Court: What do you claim for this?

Mr. Stason: If the court please, our theory of the matter is this; the defendants are setting up a defense of fraud, claiming that Mr. Hurni attempted to defraud the insurance company securing this policy. The object of the testimony is showing the conduct of Mr. Hurni with reference to the matter of taking out policies was not the conduct of a person attempting to defraud an insurance company.

Objection overruled.
Exception.

A. We had.
Q. Had the other agents been down there very often?

Same objection, ruling, exception.

A. They had.
Q. State if you know whether or not these other agents were agents who were being solicited by Mr. Hurni, or whether they came there to see him?

71 Defendant objects as incompetent, irrelevant, immaterial and not proper rebuttal testimony, it calls for a conclusion of the witness.
Overruled.
Exception.

A. They came there to see him.
Q. At the time Mr. Rose was there with reference to the matter of insurance at the time the policy was taken out, what was the condition of Mr. Hurni's health if you know?

Defendant objects as calling for a conclusion of the witness.
(Question withdrawn.)

Q. Was Mr. Hurni about the plant during that time.
A. Yes, he was.
Q. State whether or not he was performing his duties as usual.

Defendant objects as calling for a conclusion of the witness.
Overruled.
Exception.

A. He was.
Q. Had he made any complaint in any way at that time about his health?
A. Not any no sir.
Q. So far as you are able to observe, state whether or not he was in good health?

Defendant objects as calling for a conclusion of the witness.
The Court: That perhaps is a conclusion, let him state what his appearance was.

A. So far as I know he was.
Q. What was Mr. Hurni's appearance as to his health.

Same objection.
Ruling.
Exception.

A. Well, a man that has spent his time mostly outside, is fair robust health he wasn't a big man or strong man, but he was wiry.
Q. Did he put in full hours during the day at that time?

A. Yes sir, 18 and 20 hours a day.

72 Q. Had you noticed any change in his condition of health, between what it was at the time the policy was taken out, and what it had been previous to that?

A. I had not.

Q. State whether or not he had been as regularly at work at the time the policy was taken out as he had been previously?

A. He had.

Q. Do you know whether Mr. Hurni could read or write; answer that by yes or no.

Defendant objects as incompetent irrelevant, immaterial, not rebutting testimony.

Overruled.

Exception.

A. Yes sir.

Q. Could he read or write?

Same objection.

Ruling.

Exception.

A. He could not.

Q. What was the extent he could write, if at all?

A. He was able to write his own name?

Q. Do you know whether or not in a way he could read the market quotation?

A. Yes he could.

Witness excused.

Plaintiff rests.

(MOTION OF PLAINTIFF FOR A DIRECTED VERDICT.)

Mr. Stason: Now at this time to wit at the close of the taking of all of the testimony in the cause, plaintiff moves the court to direct a verdict in favor of the plaintiff for the amount sought to be recovered, on the ground that the evidence and the record in the cause, shows without dispute that the defendant did not within the two years' contestable period, take any affirmative action to cancel the policy or take any action whatsoever to cancel or annul the same, and in fact failed to tender back the premium until the 12th of November, 1917, or to take any other steps whatsoever for the purpose of contesting, cancelling or rescinding the policy of insurance upon which this action is brought, on any of the grounds set up as a defense, as required by the following provision of the policy, to

73 wit: "This policy shall be incontestable, except for nonpayment of premiums, provided two years shall have elapsed from the date of its issue."

(MOTION OF DEFENDANT FOR A DIRECTED VERDICT.)

Mr. Struble: The defendant at this time, at the close of all of the testimony, moves the court to instruct the jury to return a verdict in its favor, on each of the following grounds:

1st. Because there is no disputed question of fact for submission to the jury.

2nd. That if this cause should be submitted to the jury, and the jury should return a verdict in favor of the plaintiff, the same must be set aside because contrary to the law and the evidence in this case, and not supported by the evidence.

3rd. Because it appears from the uncontradicted testimony in this case, that there never was any binding contract of insurance made between the plaintiff and this defendant, for the reason that it appears from the testimony uncontradicted in this record, that the applicant Rudolph Hurni, made false and fraudulent misrepresentations of material facts to the medical examiner of the defendant company, which were relied upon by said medical examination, and thereby secured the issuance by said examiner of a certificate of health, and thereby secured the policy of insurance sued on in this case, and this certificate thus issued by the examining physician Dr. Gibson, was as shown by the uncontradicted testimony in this case, procured by fraud and deceit of said Rudolph Hurni.

4th. Because it appears from the record in this case, that said matter had been heretofore submitted to this court upon issues heretofore raised in this court. That said cause was decided by this court. That thereafter the defendant herein, sued out a writ of error to the circuit court of appeals of the United States; that the hearing upon said writ, and the return made thereon was had in said circuit court of appeals, and therein decided that the certificate in question, and the policies in question were procured by fraud, and that there was no binding contract of insurance between the parties to this case, or between the defendant and said Rudolph Hurni, and that thereafter, the plaintiff herein, sought to have the action of the Circuit Court of Appeals reviewed by the United States Supreme Court, which court refused to review said action of said Circuit Court of Appeals, and that in the former trial of said cause, the plaintiff elected to make the record upon which it would submit to this court and in appellate courts, its rights under
74 said policy and so doing and so electing, cannot now urge any other claims as against the defenses raised in this action than they have heretofore elected to make. And further, because the record as made upon this trial is the same record, and the testimony is in substance the same as that presented in the former trial of this case, and upon which the decision of the Circuit Court of Appeals was rendered, and for the further reason that the claim of plaintiff that the defense to this policy is not now available, cannot be made and the record in this case discloses that said defense can be made and that under the terms of the policy the company

has the right to make the defense pleaded in this case, and under the facts as shown in this record.

(COURT'S INSTRUCTIONS TO THE JURY, ETC.)

The Court: Gentlemen of the Jury—The testimony in this case as you know was closed some time yesterday. Immediately upon the close of the testimony, the parties, both plaintiff and defendant immediately moved for a directed verdict of the jury in their respective favor; that is, the defendant moved for a verdict in its favor, for the court to direct a verdict in its favor, while the plaintiff made a like motion in its own behalf, that the jury return a verdict in favor of the plaintiff for the amount of this policy of insurance.

Gentlemen, by that motion, the counsel have imposed upon the Court, the duty of determining this controversy, and it relieves you men of any responsibility in regard to it. Now by that action, under the law, the duty rests upon the court to determine which of these parties is entitled to this verdict, and all that the jury will have to do is to follow the direction of the court in regard to that. If any mistake is made, the responsibility rests upon the court and not upon the jury.

Now gentlemen, that is an important responsibility, that the court must determine, which of these parties is entitled to this verdict. Now I may say briefly, and that is all I care to say, and all I need to say is, that I have reached the conclusion that the plaintiff is entitled to your verdict, that is, the plaintiff is entitled to recover from this defendant insurance company the amount of this policy which is something like $25,000.00 and I want the counsel to compute the amount of this verdict.

This policy, gentlemen, bears the date of the 23rd day of August -915, and a policy bearing that date was delivered to
75 the plaintiff Rudolph Hurni, for the benefit of the plaintiff in this case the Hurni Packing Co. Now Mr. Hurni died on the 4th of July 1917, after that policy was delivered to him. The policy contains this clause, "This policy shall be incontestable except for non-payment of premiums, providing two years shall have elapsed from the date of its issue." Mr. Hurni died on the 4th of July 1917, after that policy was delivered, soon after having paid to the defendant the second annual premium, the first having been paid by him to the defendant, soon after the date of the policy, which is August 23rd 1915, and due proof of such death was given to the defendant some time in August 1917. Now, gentlemen, this case was brought once before as you learned from what occurred here yesterday, with the result that upon a motion made at the close of that trial, the same as has been made here, the court directed a verdict be found in favor of the plaintiff, and it was accordingly entered. By the proper proceedings, the defendant removed the cause by filing a writ of error to the Circuit Court of Appeals of this circuit, and upon the hearing of the case in that court,

the court reversed the judgment of this court and sent the case back for a new trial, that is why it is back here for a new trial, with the direction that a new trial be granted. Upon the coming down of the mandate from the Court of Appeals, they amended the pleadings so that the plaintiff, that is, the Hurni Packing Co., raised the question as to the incontestability of this policy and that is the first time that that question was raised for judicial determination in this cause.

This trial has resulted in what I have just announced to you; that it is the opinion of the court that upon the facts as disclosed by the testimony in this case, and the proceedings of the parties, that the court finds as a fact that the plaintiff is entitled to recover, and it will be your duty to return a verdict accordingly.

Mr. Struble: May we take exception now?

The Court: Yes sir.

Mr. Struble: At this time the defendant excepts to the ruling of the court sustaining the motion of the plaintiff for a verdict in its favor. The defendant also at this time excepts to the instructions of the court given the jury, to return a verdict in favor of the plaintiff. The defendant also at this time excepts to the ruling of the court overruling the motion of the defendant for a verdict in its favor. The defendant also excepts to the judgment rendered
76 against the defendant upon the verdict returned by the jury under instructions of the court.

The Court: Ample time will be given the defendant to prepare its bill of exceptions. This motion on behalf of the defendant is overruled upon each ground thereof, to which proper exception is taken. The defendant is given sixty days in which to file a motion for a new trial and upon the determination of that, time will be given for the settlement of the bill of exceptions, and the supersedeas or bond will be stayed until the motion for new trial is overruled.

(EXHIBIT C.)

(*Stipulation as to Certain Facts.*)

It is hereby stipulated and agreed by and between the parties to the above entitled cause as follows: to-wit:

1. That the policy sued on in this case was in fact executed by the signatures of the President and Secretary and the counter signature of the Registrar of the Mutual Life Insurance Company on or about the 7th day of September A. D. 1915, and not before that date and year. That said policy was dated back, to-wit to August 23, 1915, in accordance with the notation on the original application of Rudolph Hurni.

2. That the policy after being executed as aforesaid, was sent by mail to the office of the Mutual Life Insurance Company in Des Moines, Iowa, for delivery under the terms and conditions of the policy.

3. That the policy sued on was sent by mail by the Des Moines

office of the Mutual Life Insurance Company to H. E. Rose, agent of the company at Sioux City, who took the application for the policy in suit; that said policy was received by H. E. Rose on or about the 12th day of September 1915 and was delivered by him to Rudolph Hurni on or about the 13th day of September 1915.

4. That at all times during the months of August and September 1917, Frederick L. Allen was the General Solicitor and Legal Representative of the Mutual Life Insurance Company and had power to act for said Company in any and all respects; that during the months of August and September 1917, Edwin J. Stason was the Attorney and Legal Representative of the Hurni Packing Company and had power to act for it in all respects in relation
77 to the policy involved in this suit and all matters and things in connection therewith. That during the months of August and September 1917, the said Frederick L. Allen and the said Edwin J. Stason acting as the Legal Representatives of their respective clients, had certain correspondence concerning the claim of the Hurni Packing Company on the policy involved in this suit, and that copies of the letters written and received by said persons, respectively, are hereto attached, marked "Stipulation Exhibits Numbers 1 to 6" inclusive; that each of said letters was written and mailed on the respective dates thereof, and was received by the addressee therein named in due course of the mails. That the copies of said letters hereto attached, and marked as aforesaid, may be received in evidence with the same force and effect as though the original letters were in each case properly identified, offered and introduced. That the letter of August 24, 1917, signed by Frederick L. Allen, General Solicitor, and addressed to R. Hurni Packing Company, Sioux City, Iowa, was received by the addressee therein named on August 27, 1917, and was on the same day transmitted by the R. Hurni Packing Company to Edwin J. Stason, and is the identical letter referred to by Mr. Stason in his letter under date of August 27, 1917, addressed to the Mutual Life Insurance Company (Legal Department), New York City, copy of which is attached hereto, as Exhibit 5.

The original or carbon copies of any other letters written by either of said representatives, which either party may choose to offer, may be offered, whether copies are attached hereto or not, copies to be of the same force and admissible as the originals.

That this suit was instituted, commenced and begun by the service of an original notice thereof on the Insurance Commissioner of the State of Iowa on August 28th, 1917. That such service of notice of this suit was valid and legal on the defendant the Mutual Life Insurance Company, and required it to appear and defend in this suit at the November 1917 term of the District Court, in and for Woodbury County, State of Iowa.

6. This stipulation may be offered in evidence by either party hereto, and if offered shall be received in evidence and made a part of the evidence in this cause as though the matters and things herein stipulated had been testified to at the trial of this cause, and shall

in all respects be as evidence offered and introduced therein; the parties hereto having so stipulated in order to avoid the expense, trouble, and loss of time which would result from the taking
78 of depositions. Provided, however, that each and every one of the facts as herein stipulated may be objected to by the party not offering the stipulation on the ground that the same are irrevelant or immaterial, it being the intention of the parties hereto to that the facts may be objected to on said grounds in exactly the same manner as if witnesses were present and testifying, or offering to testify to such facts as are stipulated. No objection, however, shall be made to the introduction of copies of letters attached to the stipulation on the ground that they are copies.

In witness whereof, the parties have hereunto set their hands this 11th day of September A. D. 1920, in duplicate. Mutual Life Insurance Company, of New York, Defendant, by Sargent Gamble & Read, Jepson & Struble, Its Attorneys. R. Hurni Packing Company, Plaintiff, by Edwin J. Stason, Its Attorney.

STIPULATION EXHIBIT 1.

Sioux City, Iowa, September 27, 1917.

The Mutual Life Insurance Company of N. Y., New York.

DEAR SIRS: Your letter of September 24th has just been received stating that you have not as yet selected counsel in Sioux City for the suit of R. Hurni Packing Company against your Company, and asking whether or not you are right in the understanding that appearance and answer will not be due until the first Monday of November. Under our statute and practice, appearance does not have to be made until noon of the second day of the term, to-wit November 6th. Under our practice the defendant does not have to plead until the 9th, and has until noon of the 13th in which to answer, provided no additional time is wanted. My object in writing you regarding the matter was in order to have the issues made up during the present term, in order that the case might be disposed of during the November term. If the issues are not made up until
79 the first part of the November term it is very improbable that the case can be tried during that term. Yours very truly, Edwin J. Stason.

STIPULATION EXHIBIT 2.

Sept. 24, 1917.

R. Hurni Packing Co. v. Mutual Life.

Edwin J. Stason, Esq., Farmers Loan & Trust Building, Sioux City, Iowa.

DEAR SIR: Your letter of the 20th inst., referring to the above entitled action has been received. We have not as yet selected counsel

in Sioux City. Am I not right in understanding that an appearance and answer will not be due until the first Monday of November? However this may be, as soon as we have selected local counsel I will be glad to advise you his name. If I am not right as to the last day for appearing and answering, I will be obliged if you will advise me.

I remain, very truly yours, Frederick L. Allen, General Solicitor. FLA-VL.

(STIPULATION EXHIBIT 3.)

Sioux City, Iowa, September 20, 1917.

The Mutual Life Insurance Company of New York (Legal Dept.), New York City, N. Y.

DEAR SIRS: I have your letter of August 31st 1917 stating that you have received notice of suit brought by R. Hurni Packing Company against you on the policy in which it is the beneficiary, and stating in reply to my inquiry, that when the matter was placed in the hands of your local counsel that you had no doubt they would be glad to take up the matter of arranging for an early trial of the case, but you did not advise me as to who your local counsel
80 was. The petition has been filed, and I have just examined the records in the court house and find that the defendant's copy of the petition has not been removed from the files. I conclude from this that local counsel have not been advised of the commencement of the action. I would like to be able to communicate with your local counsel, but cannot do so of course until I learn who they are. Yours very truly, Edwin J. Stason. EJS-t.

(STIPULATION EXHIBIT 4.)

August 31, 1917.

Re Rudolph Hurni Insurance.

Edwin J. Stason, Esq., Farmers Loan & Trust Building, Sioux City, Iowa.

DEAR SIR: We beg to acknowledge receipt of your letter of 27th inst., at about the same time as we received a summons in the suit brought by the P. Hurni Packing Company against this company. The case will be placed in the hands of local counsel at Sioux City and it is our custom to hold such counsel responsible for conducting the defense in a case of this character. For that reason we are not in a position to enter into any stipulations or agreements and bind our counsel. We have no doubt that when this matter is placed in the hands of local counsel they will be very glad to take the matter up with you and to make any stipulation they think advisable. Yours very truly, Frederick L. Allen, General Solicitor. FFH-M.

(STIPULATION EXHIBIT 5.)

Sioux City, Iowa, August 27, 1917.

The Mutual Life Insurance Company (Legal Department), No. 55 Cedar St., New York City.

DEAR SIRS: The Secretary of the R. Hurni Packing Company has just handed to me your letter to the Company dated August
81 24, 1917, in which you state that your policy No. 2,351,875 on the life of Mr. Rudolf Hurni, recently deceased here, would not be paid because of your claim "that the deceased made untrue statements in his application for the policy." For reasons relating to the affairs of the beneficiary, we desire very much to have the question of your liability on this policy determined at the very earliest practicable moment. We have just mailed to the Auditor of State an original notice of suit for service. While the notice is for the November term, we would like to have the cause docketed for the September term which convenes on the 4th day of September. I can prepare the petition for filing immediately upon hearing from you, and the issues can be made up at least at the first term *at least*, and the case finally disposed of at the November term. Unless you will agree to this we will not be able to do more during the November term than to make up the issues, and will be unable to try the case till next year. If you will adopt my suggestion, I assure you that I will extend to your counsel all proper favors as to time to plead. Very truly yours, Edwin J. Stason.

(STIPULATION EXHIBIT 6.)

August 24, 1917.

Policy No. 2,251,875—Rudolph Hurni.

R. Hurni Packing Co., Sioux City, Iowa.

GENTLEMEN: It is my duty to inform you that the claim made by you under the above numbered policy was placed before the Company on the 22nd inst., and that payment was declined by the company on the ground, among others, that the deceased made untrue statements in his application for the policy.

In his application for the said policy the deceased offered his statements and answers to the company as an inducement to issue the proposed policy. The Company has evidence satisfying it that the deceased made untrue statements in his application concerning his health and attendance by physicians. In view of these untrue statements the Company is not legally liable to pay the claim.
82 This statement of the grounds of the Company's action is made without prejudice to any and all other grounds of defense that may exist. Very truly yours, Frederick L. Allen, General Solicitor. FFH-R.

(EXHIBIT "B.")

(*Application of Rudolph Hurni for Insurance.*)

Date Policy, August 23rd, 1915; Age 47.

This application is made to the Mutual Life Insurance Company of New York. All the following statements and answers, and all those that I make to the Company's Medical Examiner, in continuation of this application, are true, and are offered to the Company as an inducement to issue the proposed policy. I expressly waive, on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has attended or examined me, or who may hereafter attend or examine me, from disclosing any knowledge or information which he thereby acquired. The proposed policy shall not take effect unless and until the first premium shall have been paid during my continuance in good health, and unless also the policy shall have been delivered to and received by me during my continuance in good health; except in case a conditional receipt shall have been issued as hereinafter provided.

1. My name is (in full) Rudolph Hurni.

2. (*a*) My residence and period of residence: Street, 3212 M. S. Blvd.; Town, City of Village, Sioux City; County, Woodbury; State, Iowa; For period of 30 years.

(*b*) My place of business is, Hurni Packing Co.

(*c*) My P. O. Address is Hurni Pkg. Co., Sioux City, Iowa.

(*d*) My former residences were—Switzerland for period of 17 years.

3. Date of my birth: Day, 24; Month, February; Year, 1868; Age at last birthday, 47 years.

83 4. Place of my birth: Town or City, Sausontonia; State or Province; Switzerland; Citizen or Subject of U. S.

5. (*a*) My present occupation is (full details, business or trade and name of firm): President and Manager, R. Hurni Packing Co.,

(*b*) I have been so engaged 20 years.

(*c*) My other occupations are: None.

(*d*) My former occupations were; Butcher.

(*e*) Period of time so engaged: 10 years.

6. I do not contemplate any change of occupation, or becoming connected with any military or naval organization or service or going to any foreign or tropical countries, except; (if none, so state) No.

7. Are you connected with any military or naval organization or service officially or otherwise? (Ans. Yes or no). No.

8. I agree that any policy the company may issue upon this application shall contain the following clause;

"If the insured under this policy engages in military or naval service, or in work as a civilian in any capacity whatever in connection with actual warfare during the first policy year there shall

immediately become due and payable to the Company a single extra payment of three per centum (3%) of the face of the policy. If the insured shall engage in such military or naval service or in such work as a civilian within the first policy year and shall die within one year from the date of beginning such service or work, without having paid to the Company said additional charge prior to the beginning of such service or work, the Company's liability hereunder shall be limited to one-fifth of the face of the policy."

9. (*a*) Name (in full) of the person i. e. beneficiary to whom the sum insured is to be made payable: R. Hurni Packing Company.

(*b*) Residence: Sioux City, Iowa.

(*c*) Relationship or insurable interest (in proposed life) of said beneficiary: ——.

84 (*d*) Privilege of changing the beneficiary from time to time provided policy has not been assigned, is desired. (Ans. yes or no). Yes.

10. I have the following insurance on my life in other Companies or Associations;

Name of company or association.	Amount.
N. Y. Life	10,000
Germania Life	5,000
Bankers of D. M.	2,000
M. W. A.	3,000

And no others.

11. (*a*) Amount of insurance applied for: $25,000.

(*b*) Plan (State fully): Ordinary Life Plan.

(*c*) Premiums to be paid: Annually.

12. Policy providing for "Waiver of Premium", in case of permanent total disability in accordance with terms of Company's forms now in use is desired if the Company consents to grant it. (Ans. Yes or No). No.

13. No negotiations for other insurance on my life are now pending or contemplated except as follows; (if none, so state). No.

14. I have never made an application nor submitted to an examination for life insurance upon which a policy has Not been issued on the plan and premium rate originally applied for, Except to the following companies or associations; (if none, so state). No.

15. I have paid $— in cash to the subscribing Soliciting Agent and received a conditional receipt therefor, signed by the Secretary of the Company making insurance in force from this date, provided this application shall be approved and policy duly issued.

During the period of one year following the date of issue of the Policy of Insurance for which application is hereby made, I will not engage in any of the following extra hazardous occupations or employments; retailing intoxicating liquors, handling electric wires or dynamos, blasting, mining, submarine labor areonautic ascensions, the manufacture of highly explosive substances, service on any

railroad train or track or in switching or in coupling cars or on any steam or other vessel, unless written permission is expressly granted by the Company. It is understood and agreed that the risk of death will not be covered by the policy if such death occur
85 by my own act, whether sane or insane, during the period of one year next following the date of issue. I agree that only the President, Vice President, a Second Vice President, a Secretary or the Treasurer of the Company, can make, modify or discharge contracts, or waive any of the Company's right or requirements, and that none of these acts can be done by the agent taking this application.

Signature in full of person whose Life is proposed for Insurance; Rudolf Hurni,

Dated Sioux City, Iowa, on September 2, 1915; I have known the above named applicant for 10 years, and saw him sign this application. H. E. Rose, Soliciting Agent.

I have issued Conditional receipt No. —.

STATEMENTS TO MEDICAL EXAMINER.

These must be recorded in the handwriting of the Medical Examiner, who should satisfy himself that the applicant's statements and answers are full and complete.

16. What is your full name? Rudolph Hurni.

17. Are you married? Yes.

18. What illnesses, diseases, injuries or surgical operations have you had since childhood?

Name of disease, etc.: Pneumonia.

Number of attacks: One.

Date of each: Fall, 1899.

Duration: 3 weeks.

Severity: Moderate.

Results: Good.

Date of complete recovery: Don't remember date.

19. State every physician or practicioner who has prescribed for or treated you, or whom you have consulted in the past five years.

Name of physician or practicioner: None consulted.

Address: ——.

86 When consulted: —— —, ——.

Nature of complaint: Give full details above under Q. 18. ——.

20. Have you stated in answer to question 18 all illnesses, diseases, injuries or surgical operations which you have had since childhood? (Ans. Yes or No.). Yes.

21. Have you stated in answer to question 19 every physician and practicioner consulted during the past five years, and dates of consultations? (Ans. Yes or No). Yes.

22. (*a*) Are you in good health? Yes.

(*b*) If not, what is the impairment?

23. (*a*) How much weight have you gained in the past year? None.

(*b*) How much weight have you lost in the past year? None.
(*c*) If any change, state cause.
24. (*a*) What is your date of birth? Feb. 24, 1868.
(*b*) Is this date or is your age a matter of record? Yes, in Switzerland?
(*c*) If so, where? In Switzerland.
25. Are you now or have you ever been engaged in any way in the sale or manufacture of beer, wine, or other intoxicating liquors? (Ans. Yes or No). No.
26. (*a*) Have you used wine, spirits or malt liquors during the past year? Yes.
(*b*) If so what has been your daily average in past year? Two glasses of beer per week.
(*c*) How much have you used in any one day at the most? Two or three glasses.
(*d*) Have you been intoxicated during the past five years? No.
(*e*) Have you ever taken treatment for alcoholic or drug habit? No.
(*f*) If a total abstainer, how long have you been so? ——.
If any of the questions 27 to 36 below are answered Yes, give details in space adjacent.

87 Answer Yes or No.

27. Have you ever raised or spat blood? No.
28. Have you a rupture or hernia? No.
29. Have you any bodily deformity? No.
30. Have you lost any part of arm or leg? No.
31. Have you any impairment of sight or hearing? No.
32. Have you ever been under treatment at any asylum, cure, hospital, or sanitarium? No.
33. Have you ever changed your residence on account of your health? No.
34. Do you contemplate making any change in your residence? No.
35. Has any member of your household suffered from tuberculosis, or consumption, during the past year? No.
36. Has there ever been any suspicion that any of your parents, brothers, or sisters ever had tuberculosis, or consumption, cancer, insanity, epilepsy, paralysis, or apoplexy? No.
37. Family Record of Applicant: Living, —; Dead, —; Age, —; Health, —.

	Age.	Specific cause of death.	How long sick.
Father	89	Old Age.....	Don't know.
Mother	75-80	Old Age.....	1 day.

Brothers (If none, so state): Number living—3; Number dead—1.
Living, —; Dead, —.
Age, —.

Age.	Health.	Specific cause of death.	How long sick.
57.	Good		
51.	Good	One brother died in infancy	.....
44.	Good		

Sisters (If none so state): Number living, 3; Number dead, 2.

88

Living.		Dead.		
Age.	Health.	Age.	Specific cause of death.	How long sick.
59.	Good	31	Child birth.	Few days.
55.	Good		One sister died in infancy.	
42.	Good			

Age of Father's father if living? If not, age at death. Over 90.
Age of Father's mother if living? If not, age at death. About 90.
Age of Mother's father if living? If not, age at death. Very old.
Age of Mother's Mother, if living If not, age at death. Very old.
I certify that each and all of the foregoing statements and answers were read by me and are fully and correctly recorded by the Medical Examiner. Rudolph Hurni. (Signature in full of person examined.)

Dated at Sioux City, State of Iowa, the 3rd day of September 1915.
Witness: C. E. Gibson, M. D.

38. (*a*) How long have you known the applicant? Stranger.
(*b*) How intimately? By Sight.
(*c*) Give some mark of identification? None.
39. General appearance? Healthy and vigorous.
40. Apparent age? 47 years.
41. Race? (White, etc.) White.
42. Weight? 142 lbs.
43. Did you weigh applicant on scales? Yes.
44. Height by measurement? 5 feet 7 inches.
45. Measurement of abdomen at level of umbilicus? 34 inches.
46. Measurement of chest at full inspiration? 36½ inches.
47. Measurement of chest at deep expiration? 32½ inches.
89 48. State the pulse rate? (Count a full minute.) 72.
49. Is the pulse intermittent or irregular? No.
50. If the applicant is ruptured examine the hernia and state.
(*a*) Is it reducible? Not ruptured.
(*b*) Is a suitable truss worn?
51. Urinary analysis of specimen voided at this examination.
(*a*) Clear or turbid? Clear.
(*b*) Gravity? 1020.
(*c*) Reaction: Acid.

(*d*) Presence of albumin? No.
(*e*) Presence of sugar? No.
(*f*) Do you know that the applicant passed this urine? Yes.

Give full details in space opposite when answer to questions 52 to 55 is Yes and when answer to questions 56 to 58 is No.

52. Do careful inquiry and thorough physical examination show any evidence or reveal any history of past or present disease or functional disturbance of:

Answer Yes or No.

(*a*) Brain or nervous system? No.
(*b*) Heart? No.
(*c*) Arteries? No.
(*d*) Respiratory organs? No.
(*e*) Liver or gall bladder? No.
(*f*) Kidneys or other urinary apparatus? No.
(*g*) Other abdominal viscera? No.
(*h*) Rheumatic or Gouty Nature? No.
(*i*) Syphilitic origin? No.
(*j*) Skin, middle ear or any part of the body? No.

90 53. Was your examination of heart and lungs made through more than one thickness of clothing? (Company's rule requires bare skin or one thickness at the most.) No.

54. Was any third person present, contrary to Company's rules while you were asking the applicant questions? No.

55. Make careful inquiry before answering these questions.

(*a*) Have you any suspicion that the applicant now uses or ever has used wine, spirits or malt liquors in otherwise than a strictly temperate manner? No.

(*b*) Have you any suspicion that the applicant now uses or ever has used opium, chloral, cocaine or other narcotics? No.

56. Have you reviewed all the answers recorded in the Statement to Medical Examiner, and in the Medical Examiner's Report? Yes.

57. After so reviewing, are you satisfied that every question has been answered fully and correctly? Yes.

58. Do you without reservation recommend the applicant for insurance? Yes.

To be answered when the person examined is a woman. Careful inquiry should be made of the applicant before answering these questions.

59. (*a*) Has she had any menstrual disorder, or symptoms of uterine or ovarian disease, or any disease of the breast?

(*b*) Has she borne any children; if so, how many and how recently?

(*c*) Has she ever had any serious trouble in labor.
(*d*) Has she ever had any abortion or miscarriage?
(*e*) Date of marriage?
(*f*) Is she now pregnant?
(*g*) Has she passed the climateric?
(*h*) Measurement of abdomen at waist line?

I certify that I have made this examination of Rudolph Hurni,

at Sioux City, on the 3rd day of September 1915, and that
91 the foregoing questions have been put and the answers of the applicant recorded as stated. C. G. Gibson, Medical Examiner.

IMPORTANT NOTICE TO MEDICAL EXAMINER.

This report is the property of the company and must be delivered or mailed promptly by the Examiner to the Agency manager as Indicated Below. It must not be withdrawn or destroyed by anyone. Before sending the Report to the Manager the Examiner must review it with care and see that every question is fully answered.

Application of Rudolph Hurni, 25,000.00.

Net premium: ——.

A.	½.	¼.	3½% loading.	Mort. margin.	Kind.	Pay't.	Due.
02.25	401.25	200.50	301.00	361.50	L.	....	....

Age.	Number.	Date.	Amount.	Premium.	How paid.
47	2,251,875	Aug. 23, 1915.	25,000	1,069.75	A.

Previous Insurance (to be filled in at agency): None.

(CERTIFICATE OF CLARENCE J. HAMILTON, REPORTER, TO BILL OF EXCEPTIONS.)

I, C. J. Hamilton, do hereby certify that I acted as the shorthand reporter in the United States District Court, in and for the Northern District of Iowa, Western Division, at the trial of the above entitled cause; that the annexed and foregoing report of the evidence, objections thereto, rulings of the court thereon and exceptions taken is a true, full and complete report of the evidence in said cause, and contains with the exhibits, records and documentary evidence referred to and identified, all of the evidence offered, given or introduced in said cause by the respective parties upon the trial thereof; all of the objections and motions of said parties thereto or any part thereof; all of the ruling of the court upon such objections and motions and all exceptions to such rulings. Clarence J. Hamilton, Reporter. Dated this 24th day of November, 1920.

92 (STIPULATION AS TO BILL OF EXCEPTIONS.)

It is stipulated and agreed by and between the parties hereto that the foregoing bill of exceptions is a correct bill of exceptions, and incorporates therein all of the evidence, both oral and documentary, adduced upon the trial of this cause and correctly shows the objections of counsel on either side to any of the testimony or evidence offered; the rulings of the court on said objections and the exceptions of the parties thereto; and all motions made orally to the court dur-

ing the trial of said cause, and the rulings of the court thereon and the exceptions thereto; and correctly shows all of the proceedings on said trial, including all rulings of the Court in connection therewith and exceptions of the parties thereto; and the same is a true and correct bill of exceptions and Exhibit "C" referred to in said bill of exceptions as being introduced and which was introduced, having been filed in the office of the Clerk of said Court, is by reference made a part of this bill of exceptions as fully and completely as if set out herein in full.

Dated this 24th day of November, 1920. B. L. Read, Jepson Struble & Anderson, Attorneys for Mutual Life Insurance Company of New York. Edwin J. Stason, Shull, Gill, Sammis & Stillwell, Attorneys for Hurni Packing Company.

(CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.)

[Filed December 2, 1920.]

The undersigned, Judge of the District Court of the United States for the Northern District of Iowa, hereby certifies that the foregoing bill of exceptions in this case, together with the exhibits therein incorporated and referred to and the stipulation "Exhibit 'C' " contains all of the evidence, both oral and documentary, given or offered at the trial of the case of the Hurni Packing Company, plaintiff, against the Mutual Life Insurance Company of New York, defendant; and shows all objections of counsel on either side of any testimony or evidence; the rulings of the court on said objections; and the exceptions of the parties [there*of*]; and all motions made in Court at the trial of said cause, orally to the court; all rulings of the court thereon and the exceptions thereto; and correctly shows all of the proceedings on said trial, including all rulings of the
93 court in connection therewith and the exceptions of the parties thereto; and that said bill of exceptions, with the exhibit therein referred to and made a part thereof, is correct in all respects and correctly shows the proceedings of said trial; and is hereby approved, allowed, signed, settled, and made a part of the record herein, including all exhibits attached thereto and referred to therein.

Dated this 24th day of November, 1920. Henry T. Reed, Judge.

[Endorsement omitted.]

(PETITION FOR WRIT OF ERROR.)

[Filed December 2, 1920.]

Now comes the Mutual Life Insurance Company of New York, defendant herein, and says, that on or about the 22nd day of October, 1920, this court entered judgment herein in favor of the plaintiff and against the defendant, in which judgment and proceedings had prior thereto in this case, certain errors were com-

mitted to the prejudice of this defendant, all of which will more in detail appear in the assignments of error which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in its behalf out of the United States Circuit Court of appeals for the Eighth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said Circuit Court of Appeals. Sargent, Gamble & Read, Jepson, Struble & Anderson, Attorneys for defendant, Mutual Life Insurance Co. of New York.

[Endorsement omitted.]

(ASSIGNMENT OF ERRORS.)

[Filed December 2, 1920.]

Comes now the Mutual Life Insurance Company of New York, defendant in the above entitled cause, and, in connection with its Petition for Writ of Error, filed herein, makes the following assignments of error upon which it will rely, which errors occurred at the trial of said cause in this Court:

1. The Court erred in admitting in evidence the policy sued on herein for the reason as stated in the objection made to the admission of said policy in evidence, namely, because upon the
94 issues heretofore joined in this cause, which issues were joined before the first trial of this cause, the plaintiff prepared and submitted its case to this Court, and thereafter by writ of error, said cause was submitted to the Circuit Court of Appeals of the Eighth Circuit, and it was found and determined by said Circuit Court of Appeals that the policy sued on herein had no binding force and effect and was void and was procured by false and fraudulent representations. The question of the right of the defendant to plead and prove the defenses which it did plead and prove was necessarily involved in the former trial of this cause and necessarily decided by the Circuit Court of Appeals in its decision.

2. The Court erred in overruling defendant's motion for a directed verdict, made at the close of the plaintiff's testimony, for each of the reasons stated in the first error herein assigned, which reasons are by reference made a part of this assignment.

3. The Court erred in sustaining plaintiff's motion for a directed verdict in its behalf, because it appears from the undisputed testimony and evidence in this case, that the policy sued on never became or was a binding contract of insurance, nor is the plaintiff entitled to recover thereon and thereunder, for the following reasons:

(a) Because it appears from the undisputed and uncontradicted testimony and evidence in this case that in his application made by him for the purpose of inducing the issuance of the policy sued on herein, the insured made false and fraudulent statements and representations to the insurer's examining physician, which statements and representations were with reference to material facts; were

known by the applicant to be false, and were made by him for the purpose of deceiving and misleading said examining physician and inducing him to certify and recommend the applicant as a fit subject for insurance. That such false and fraudulent statements and representations made by said applicant were relied upon by said examining physician as being true, and that because thereof and in reliance thereon said examining physician made and issued a certificate of health and recommendation of the appellant as a fit subject for insurance.

Said false statements and representations are more fully set out in subdivision "B":

(*b*) Because it is provided, among other things, in the policy sued on herein as follows:

95 "The policy and the application herefor, copy of which is endorsed herein or attached hereto, constitutes the entire contract between the parties hereto. All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, * * *"

And it is provided among other things, in the application made by the insured to the defendant, as follows:

"This application is made to the Mutual Life Insurance Company of New York. All the following statements and answers and all those that I make to the company's medical examiner in continuation of this application, are true, and are offered to the Company as an inducement to issue the proposed policy."

That it appears from the uncontradicted testimony and evidence in this case that the applicant Rudolph Hurni was guilty of fraud in the making of his application for the policy sued on herein and in his procurement of the policy, and because thereof, and under and by virtue of the terms and conditions of the policy, the statements contained in the application became and were warranties. That such statements in the application, consisting of answers made and certified as true, by the applicant, are as follows, to-wit: In answering Question No. 18, in the "Statements made to Medical Examiner," which question is as follows: "What illness, diseases, injuries or surgical operations have you had since childhood." Said applicant answered: "Pneumonia, results good." In answering question No. 19, in the "Statements to Medical Examiner" which question is as follows: "State every physician or practitioner who has prescribed for or treated you, or whom you have consulted, in the past five years," said applicant answered: "None consulted." That in answer to question No. 20 in said "Statements to Medical Examiner" which question is as follows, to-wit: "Have you stated in answer to question 18 all illnesses, diseases, injuries, or surgical operations which you have had since childhood?" said applicant answered "Yes." That in answering question No. 21 of said "Statements to Medical Examiner" which question is as follows, to-wit: "Have you stated in answer to question 19, every physician or prac-

titioner consulted during the past five years and dates of consultation?' said applicant answered "Yes." That in answering Question No. 22 of said "Statements to Medical Examiner" which question is as follows: "Are you in good health?" said applicant answered "Yes."

96 That each of said answers made by said applicant and recorded in his application, and certified by him as being true, were false and untrue; were in reference and relation to material facts, must have been and were known by the applicant to be false and untrue and were relied upon by the examining physician of defendant company and by the company, as true. And each and all of said false statements, representations and answers were made by the applicant prior to the issuance of the certificate of health, and prior to the issuance of the policy sued on herein.

(*c*) Because it appears from the uncontradicted testimony and evidence in this case that the false statements, representations and answers made by the applicant Rudolf Hurni in his application and to the examining physician of the defendant company (the same being set out verbatim in sub-division "*b*" hereof) were made by said applicant with the intention and purpose of inducing the said examining physician to certify and recommend him as a fit subject for insurance and to issue a certificate of health; and it further appears without contradiction in the evidence in this case that the said examining physician relied upon all of the statements and representations made by the applicant as true, and was induced thereby to issue a certificate of health and recommend the applicant as a fit subject for insurance. That therefore as a matter of law and fact, it appears without contradiction, that the certificate of health and recommendation of the examining physician was procured by the fraud and deceit of the applicant Rudolph Hurni, and that the policy sued on herein was procured by the fraud and deceit of said Rudolf Hurni.

(*d*) And for the further reason that it does appear from the evidence in this case that the policy in suit, while dated August 23, 1915, was, nevertheless, applied for by the insured on the 2nd day of September 1915; the policy actually signed by the officers of the Company on September 7, 1915; and the policy actually delivered to the insured on September 13, 1915, and under the terms of said policy and the application, the same did not become a binding contract between the parties until September 13, 1915; and because under the terms of the policy the defendant had a right to contest the same within two years from the date of the issuance thereof, which issuance was the 13th day of September 1915, and the defendant did, within two years from the date of the issuance of said policy, contest the same.

97 4. The Court erred in overruling the defendant's motion for a directed verdict in its favor for each of the reasons stated heretofore, in the preceding assignment of errors, which grounds are hereby by reference made a part of this assignment.

5. The Court erred in instructing the jury to return a verdict in favor of the plaintiff and against this defendant for the reason and upon the grounds heretofore stated, in support of the third assignment of error herein contained, which reasons and grounds are by reference made a part of this assignment.

6. The court erred in entering judgment upon said verdict so returned in favor of the plaintiff and against this defendant for the same reasons stated in support of the third assignment of errors herein contained, which reasons and grounds are by reference made a part of this assignment.

Wherefore, this defendant prays that the judgment of the District Court of the United States for the Northern District of Iowa Western Division, be reversed, and that said District Court be directed to enter a judgment in favor of the defendant and against the plaintiff in lieu of the judgment heretofore entered herein, and that such other and further relief may be had as may be proper in the premises. Mutual Life Insurance Company of New York, by Sargent Gamble & Read, Jepson Struble & Anderson, its attorneys.

Endorsed on the back of the Assignment of Errors is the following: "Presented to me with petition for writ of error this 2nd day of December 1920. H. T. Reed, Judge."

[Endorsement omitted.]

98 **(ORDER ALLOWING WRIT OF ERROR.)**

[Filed December 2, 1920.]

Now to-wit on the 2nd day of December 1920, came the defendant by its attorneys, and filed herein and presented to the Court, its petition, praying for the allowance of a writ of error and assignments of error intended to be urged by it, and praying also that a transcript record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals of the Eighth Circuit, and that such other and further proceedings may be had as may be proper in the premises;

Whereupon upon consideration thereof, the court does allow said writ of error as prayed, and that a certified transcript of the record testimony, exhibits, stipulations, and of all proceedings, be forthwith transmitted to the said United States Circuit Court of Appeals for the Eighth Circuit; that defendant give bond according to law in the penal sum of Thirty seven Thousand Five Hundred dollars ($37,500.00), the same to operate as a supersedeas bond. Henry T. Reed, Judge.

[Endorsement omitted.]

(SUPERSEDEAS BOND ON WRIT OF ERROR.)

[Filed Dec. 2, 1920.]

Know all men by these presents:

That we, Mutual Life Insurance Company of New York, as principal and United States Fidelity & Guaranty Co., as surety are held and firmly bound unto the Hurni Packing Company, plaintiff in the above entitled action, and defendant in error in the penal sum of Thirty Seven Thousand Five Hundred Dollars ($37,500.00) lawful money of the United States, well and truly to be paid to the Hurni Packing Company, its successors and assigns, for which payment well, and truly to be made, we bind ourselves and successors, assigns and legal representatives, jointly and severally, by these presents.

Dated at Sioux City, Iowa, this 23rd day of November 1920.

The condition of the above obligation being such that, Whereas, in the District Court of the United States in and for the Northern District of Iowa, Western Division, in a suit pending in said court between the Hurni Packing Company plaintiff and the Mutual Life Insurance Company of New York, defendant, a judgment was rendered against said Mutual Life Insurance Company of New York on the 22nd day of October 1920, and the said Mutual Life
99 Insurance Company of New York having applied for a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit, and filed its petition and assignment of errors in the office of the Clerk of the said District Court of the United States for the Northern District of Iowa, Western Division, to reverse said judgment in the aforesaid suit.

Now the conditoin of the above obligation is such, that if the said Mutual Life Insurance Company of New York shall prosecute said writ of error to effect, and answer all damages if it fail to make good its said plea, then the above obligation to be void, otherwise to remain in full force and virtue. Mutual Life Insurance Company of New York, Principal, by Ralph L. Read, Jepson, Struble & Anderson, Its Attorneys. (Seal.) United States Fidelity & Guaranty Co., Surety, by Guy W. Andrews, Attorney in Fact.

The foregoing bond is hereby recommended for approval. Edwin J. Stason, Attorney for Hurni Packing Co.

APPROVAL OF BOND.

The within and foregoing Supersedeas Bond is approved as to form and sufficiency of sureties, this 2nd day of December 1920. Henry T. Reed, Judge of the District Court of the United States in and for the Northern District of Iowa, Western Division.

[Endorsement omitted.]

(STIPULATION AS TO TRANSCRIPT OF RECORD.)

[Filed Dec. 27, 1920.]

It is hereby stipulated and agreed by and between the parties hereto, that the Clerk of this Court, in preparing his transcript under the writ of error sued out herein, shall incorporate in said transcript, and there shall be printed as the record in the Circuit Court of Appeals, the complete record, including all pleadings of every
100 kind and nature, the original notice served and acceptance of service thereon, and order of removal of said cause to the Federal Court, all of the testimony, the complete bill of exceptions, all entries in the cause in the Clerk's office, except such entries as have to do with the trial and submission of this cause upon the first trial thereof, and each and every other matter of record in said cause, with the exception that it shall not be necessary to certify up a copy of the petition for removal of said cause from the District Court of Woodbury County, Iowa, the notice thereon or the bond for removal given in connection therewith, it being hereby stipulated that this cause is a cause of which the District Court of the United States, in and for the Northern District of Iowa, Western Division, had jurisdiction, and the Circuit Court of Appeals for the Eighth Judicial Circuit, has jurisdiction.

It is further stipulated that in making up such record the Clerk shall incorporate in his transcript a complete copy of the application for the policy of insurance sued on in this case, but that it shall only be necessary for him to certify up the following paragraphs of the policy of insurance;

The Mutual Life Insurance Company of New York,

Number 2,251,875. Amount, $25,000. Age, 47. Annual Premium, $1,069.75.

In consideration of the annual premium of one thousand sixty-nine and 75.100 dollars, the receipt of which is hereby acknowledged, and of the payment of a like amount upon each twenty-third day of August hereafter until the death of the insured, promises to pay to the Home Office of the Company in the City of New York, upon receipt of said Home Office of due proof of the death of, Rudolph Hurni, of Sioux City, Iowa, Woodbury, State of Iowa, herein called the insured, Twenty-five Thousand Dollars, less an indebtedness hereon to the Company and any unpaid portion of the premium for the then current policy year, upon surrender of this policy, properly receipted to R. Hurni Packing Company, its successors or assigns, the beneficiary, with right to the insured to change the beneficiary.

Death of Beneficiary before Insured; Change of Beneficiary:

101 If any Beneficiary die before the insured the interest of such beneficiary will vest in the Insured, unless otherwise provided herein.

When the interest of a Beneficiary shall have vested in the Insured, or when the right to change the beneficiary has been reserved, the Insured, if there be no existing assignment of this policy, may, while this Policy is in force, designate a new Beneficiary, with or without reserving the right to change the beneficiary, by filing written notice thereof at the Home Office of the Company, accompanied by this Policy for suitable indorsement hereon. Such change shall take effect upon the indorsement of the same on the Policy by the Company.

Premiums; All premiums are payable in advance at said Home Office, or to any agent of the Company upon delivery, on or before date due, or a receipt signed by either the President, Vice President, Second Vice President, Secretary or Treasurer of the Company and countersigned by said agent.

A grace of thirty days (or month if greater) subject to an interest charge at the rate of five per centum per annum, shall be granted for the payment of every premium after the first during which time the insurance shall continue in force. If death occur within the period of grace, the overdue premium and the unpaid portion of the premium for the then current policy year, if any, shall be deducted from the amount payable hereunder.

Except as herein provided the payment of a premium or installment thereof shall not maintain this policy in force beyond the date when the next premium or installment thereof is payable. If any premium or installment thereof be not paid before the end of the period of grace, then this policy shall immediately cease and become void, and all premiums previously paid shall be forfeited to the Company except as hereinafter provided.

108. Conditions.

Residence and Travel.—This policy is free from any restrictions as to residence and travel.

Suicide.—The Company shall not be liable hereunder, in the event of the Insured's death by his own act, whether sane or insane, during the period of one year, after the date of issue of this policy, as set forth in the provisions of the application endorsed thereon or attached hereto.

102 Incontestibility.—This Policy shall be incontestable except for non-payment of premiums, provided two years shall have elapsed from its date of issue.

This Policy, and the application therefor, copy of which is endorsed hereon or attached hereto, constitute the entire contract between the parties hereto. All statements made by the Insured, shall in the absence of fraud, be deemed representations and not warranties, and no statement of the insured shall avoid or be used in defense to a claim under this Policy unless contained in the written application hereof and a copy of the application is endorsed on or attached to this Policy when issued.

If the age of the insured has been mis-tated, the amount payable hereunder shall be such as the premium paid would have purchased at the current age.

Agents not authorized to modify this policy or extend the time for paying a premium.

In witness whereof, the Company has caused this Policy to be executed this twenty-third day of August 1915. W. J. East, Secretary. Charles A. Peabody, President. Countersigned: —— ——, Asst. Registrar."

It is further stipulated that the application referred to in said policy was attached to the same, a copy thereof being so attached.

It is the intention of this stipulation to present to said Circuit Court of Appeals the entire record made in the lower Court in this cause. Edwin J. Stason, Attorney for Plaintiff. Ralph L. Read, Jepson, Struble & Anderson, Attorneys for defendant.

[Endorsement omitted.]

103 **(WRIT OF ERROR AND CLERK'S RETURN.)**

[Filed Dec. 2, 1920.]

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the District Court of the United States for the Western Division of the Northern District of Iowa, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the October, 1920 Term, thereof, between Hurni Packing Company, Plaintiff and Mutual Life Insurance Company of New York, Defendant, a manifest error hath happened, to the great damage of the said defendant, Mutual Life Insurance Company of New York, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid, at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, on or before the 2nd day of February, 1921, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 2nd day of December in the year of our Lord one thousand Nine hundred and twenty.

Issued at office in the City of Sioux City, with the seal of the District Court of the United States for the Western Division of the

Northern District of Iowa, dated as aforesaid. Lee McNeely, Clerk District Court United States, Western Division of the Northern District of Iowa.

Allowed by Henry T. Reed, Judge.

104 **(RETURN TO WRIT.)**

UNITED STATES OF AMERICA,
Western Division of the Northern District of Iowa, ss:

In obedience to the command *if* the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Eighth Circuit, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name, and affix the seal of said Circuit Court, at office in the City of Dubuque, Iowa, this 24th day of January A. D. 1921. Lee McNeely, Clerk of said Court. [Seal of the U. S. Dist. Court, West. Div. North. Dist. of Iowa.]

[Endorsement omitted.]

(CITATION AND ACKNOWLEDGMENT OF SERVICE.)

[Filed Dec. 13, 1920.]

The United States of America to Hurni Packing Company, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the Western Division of the Northern District of Iowa, wherein Mutual Life Insurance Company of New York, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Henry T. Reed, Judge of the District Court of the United States for the Northern District of Iowa, this second day of December in the year of our Lord one thousand nine hundred and twenty. Henry T. Reed, United States District Judge, for the Northern District of Iowa. [Seal of the U. S. Dist. Court, West. Div. North. Dist. of Iowa.]

105 Due, legal and timely service of the foregoing citation is hereby acknowledged and copy thereof received this 10th day of December, 1920. Hurni Packing Company, by Edwin J. Stason, Its Attorney.

[Endorsement omitted.]

(CLERK'S CERTIFICATE TO TRANSCRIPT.)

[Filed Feb. 1, 1921.]

UNITED STATES OF AMERICA,
Northern District of Iowa, ss:

I, Lee McNeely, Clerk of the District Court of the United States in and for the Northern District of Iowa do hereby certify that the foregoing is a full, true and perfect transcript of such parts of the record and proceedings as are designated by the Stipulation of Parties filed herein and made a part of this Transcript, on Return to Writ of Error, in the case entitled,—Hurni Packing Company, a corporation, Plaintiff vs. The Mutual Life Insurance Company of New York, defendant, No. 230, Law, Western Division; as fully as the same remain on file and of record in my office as such Clerk;

I further certify that a certified copy of the Writ of Error was filed in my office at Sioux City, Iowa on the 2nd day of December 1920, and I now return said Original Writ of Error with return of service together with the Citation and proof of service thereof.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court at my office in said District this 24th day of January, 1921. Lee McNeely, Clerk United States District Court, Northern District of Iowa. [Seal of the U. S. Dist. Court, West. Div. North. Dist. of Iowa.]

[Endorsement omitted.]

106 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

APPEARANCES.

[Filed Feb. 1, 1921 and Mar. 14, 1921.]

[Title omitted.]

The Clerk will enter my appearance as Counsel for the Plaintiff in Error. Ralph L. Read.

[Endorsement omitted.]

[Title omitted.]

The Clerk will enter my appearance as Counsel for the Plaintiff in Error. C. N. Jepson, G. T. Struble, J. W. Anderson, Sioux City, Iowa.

[Endorsement omitted.]

107 [Title omitted.]

The Clerk will enter my appearance as Counsel for the defendant in Error. Edwin J. Stason, 600-601 Farmers Loan & Trust Bldg., Sioux City, Iowa. Charles M. Stilwill, 625 Frances Building, Sioux City, Iowa.

[Endorsement omitted.]

(ORDER OF SUBMISSION.)

December Term, 1921.

Thursday, December 8, 1921.

This cause having been called for hearing in its regular order, argument was commenced by Mr. G. T. Struble for plaintiff in error, continued by Mr. Edwin J. Stason for defendant in error and concluded by Mr. Ralph L. Read for plaintiff in error.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

108 **(OPINION.)**

[Filed April 4, 1922.]

[Title omitted.]

Mr. G. T. Struble and Mr. Ralph L. Read (Messrs. Sargent, Gamble & Read and Messrs. Jepson, Struble & Anderson, were with them on the brief), for plaintiff in error.

Mr. Edwin J. Stason (Mr. Charles M. Stilwill was with him on the brief), for defendant in error.

Before Sanborn and Lewis, Circuit Judges, and Van Valkenburgh, District Judge.

VAN VALKENBURGH, *District Judge,* delivered the opinion of the Court.

This case comes before this court for the second time (260 Fed. 641). On the first appeal the judgment of the trial court, which was in favor of defendant in error herein, was reversed and the case was remanded for a new trial for the reason that the statement made by the insured, in his application for life insurance, that he had not consulted nor been treated by a physician during the previous five years, when, in fact, he had been treated or prescribed for each year for supposedly temporary ailments, was held to be a material misrepresentation, which, under the terms of his contract, invalidated the policy. In the opinion of the appellate court the

trial court should have directed a verdict for the defendant.

109 In the court below, after the case had been re-docketed, and after a second trial, the plaintiff, by leave of court, amended its reply as follows:

"The plaintiff states that the defendant failed to contest the policy of life insurance payable to the plaintiff, by the tender of the return of the premiums paid or otherwise within the two year period in which the policy might be contested as provided by the terms thereof, and it is now barred from setting up or urging any of the defenses set forth in its answer."

At the close of the evidence below both parties submitted motions for a directed verdict; that of defendant in error was sustained,—a verdict was directed accordingly and judgment for defendant in error resulted.

It is already the law of the case, as held by this court on the former appeal, that the false statement complained of was made, and constitutes a sufficient defense to the collection of this insurance, in the absence of countervailing circumstances. The contention now presented is that the Insurance Company, under the terms of its policy, has interposed that defense too late for legal effectiveness. This is the only question in the case.

The policy, by the construction of which, coupled with the steps taken by the defendant company to avail itself of its provisions, this case must be decided, was in fact executed in the City of New York by the signatures of the President and Secretary on the 7th day of September, 1915. It was then sent by mail to the office of the defendant company in Des Moines, Iowa, for delivery under the terms and conditions of the policy. Said policy was received by defendant's agent on or about September 12, 1915, and was delivered by him to the insured on or about the 13th day of September, 1915. The policy upon its face contains the permission that "the applicant, upon request, may have policy antedated for a period not to exceed six months". In connection therewith no other qualification, limitation or explanatory matter appears. Interlined between the heading and the body of the application appear these words: "Date policy, August 23, 1915; age 47". This is taken to evidence the request of the applicant referred to; and in accordance therewith the insurance policy contains the following testimonium:

110 "In witness whereof, the company has caused this policy to be executed this 23rd day of August, 1915. W. J. Eastman, Secretary. Charles A. Peabody, President."

It clearly appears, therefore, that the date of execution and of the policy, by contract and agreement, was fixed as the 23rd day of August, 1915. It was further provided that the annual premium should be paid upon each 23rd day of August thereafter until the death of the insured.

In the body of the policy this clause occurs:

"Incontestability: This policy shall be incontestable except for nonpayment of premiums, provided two years shall have elapsed from its date of issue."

The insured died on the 4th day of July, 1917, less than two years from the time the policy was issued under any theory of the case. Proofs of death were duly submitted. Replying to the claim thereby made, on the 24th day of August the attorney for the Insurance Company, conceded by stipulation to have been clothed with full authority to act in that behalf, wrote to the attorney for the beneficiary, conceded to have like authority, that the company declined to pay the policy upon the ground of the misrepresentation hereinabove referred to. This was the first action of any nature taken by the company to avail itself of the defense reserved in the two year clause above quoted.

It is contended by the Insurance Company that the policy must have been in effect two years during the life of the insured; otherwise, the right of the Insurance Company to contest became fixed by death within the period of limitation. We cannot agree with this view. The reservation for the benefit of the company was one that might be waived. Affirmative action was necessary to the consummation of the inchoate right created by the terms of the policy. We are equally of opinion that a repudiation of the claim of defendant in error, such as that made in the letter of August 24th, was a sufficient act of contest, and that court proceedings were not essential to the assertion of the right, as counsel for defendant in error contend. This being true, there remains only to consider whether the defendant company acted in time. We do not think it did. It is conceded that its letter of repudiation was not written nor
111 mailed until the date it bears, which is August 24th,—one full day beyond the two year period, as evidenced by the date of the policy, but plaintiff in error insists that the date of the application, the actual date of execution, the date of delivery, and a provision in the application that the proposed policy shall not take effect "unless and until the first premium shall have been paid during my continuance in good health, and unless also the policy shall have been delivered to and received by me during my continuance in good health", extend the two year period of contestability at least to the 7th day of September, if not to the 13th day of September, and that, therefore, its said affirmative act of contest was in good time.

The clause last quoted cannot aid the insurer. Its objective was the good health of the insured at the time of paying the first premium and the delivery of the policy. Conceding that the first premium may not have been paid until the policy was delivered, there is nothing in the record to indicate that the insured was not in good health within the meaning of the instrument on that date. He was found by the examiner for the Insurance Company to be in good health on the date the examination in connection with the application was made, and there is no intimation that his physical condition had changed in the meantime; but, more than this, the period of

contestability was not made to depend upon the payment of the premium nor the delivery of the policy. The language is "two years from its date of issue"; and by agreement the conventional date of execution, and hence of issue, was the 23rd day of August, 1915. In the absence of any qualifying language the date of a policy is always taken to mean the date of its issue; and the language of an insurance policy, when uncertain and ambiguous, has always been construed in favor of the insured and more strongly against the insurance company. So the courts have uniformly held. Mass. Benefit Life Ins. Co. v. Robinson (Ga.) 42 L. R. A. 261-269; Ruling Case Law 1201-1233; Anderson v. Mutual Life Ins. Co., 164 Cal. 712; Harrington v. Mutual Life Ins. Co. (N. D.) 131 N. W. 246; Wood v. American Yeomen, 148 Ia. 402-404; Monahan v. Fidelity Mut. Life Ins. Co., 242 Ill. 488.

It ws stated in argument, based upon the testimony of the witness Spencer for the company, that this concession that the policy might be antedated had reference only to the payment of
112 premiums and to the privileges attaching to age. While this may have been the chief object in the mind of the company, nothing appears which restricts the effect of the date of the policy to these special objects. We must take the date agreed upon as the date of the policy for all purposes affected thereby.

It is a matter of common knowledge that no policy bears a date identical with that of its delivery, or of conditions and happenings governing the time when it becomes effective. These incidents are rarely regarded as conditioning the date of the issue or execution as evidenced by the date appearing upon the face of the policy. If it had been the purpose of the insurer to depart from the customary rule of construction and interpretation in this respect, it could, and would, have adopted language expressive of that purpose. Instead of "date of issue" it would naturally have provided that the two years should elapse "from date of delivery" or "from the date the policy becomes effective," or from the "time" instead of "date" of issue. It may be further noted that the language used is its date of issue; thereby referring more obviously to the date borne by the policy itself.

We do not feel at liberty to read into this contract terms which it does not contain nor to vary the natural and customary meaning of the terms employed. In the absence of any qualifying and binding language to the contrary, it may be conceded that an insurance policy would not be conceived to exist prior to the date of the application upon which, in part, it is issued; but it was entirely within the contracting power of the parties to stipulate that the issuance of the policy, for all purposes contingent upon such issue, should antedate the actual physical fact, and this, in our opinion, is what they did.

For the reasons above stated, the judgment should be Affirmed, and it is so ordered.

[Endorsement omitted.]

OPINION.

(Filed Apr. 4, 1922.)

SANBORN, *Circuit Judge,* dissenting: The real question in this case is whether the parties to the insurance policy in controversy agreed thereby that it should be contestable for two years from the date of the policy, or for two years from the date of
113 the issue of the policy. The clause of contestability which contains the answer to this question reads: "This policy shall be incontestable except for nonpayment of premiums, provided two years shall have elapsed from its date of issue." It cannot be successfully denied that this clause in itself expresses an unambiguous agreement that the policy shall be contestable by the company for two years from its date of issue. The date of a policy is not generally the date of its issue. Normally and usually, the date of a policy is the date of the signature thereto of the officers of the corporation, and that date is almost universally, as it was in this case, a different date from the date of the issue of the policy. Issue means "To deliver for use." A policy is not issued when it is dated and signed by the officers of the company, nor until it has been delivered to and accepted by the insured. The application for it is a request for a policy, the policy is a proposal of the company to insure on the terms specified therein, the receipt and acceptance of such a policy by the insured first closes the contract. Until that acceptance there may be negotiations but no contract. Upon such receipt and acceptance on September 13, 1915, and not before, was there a contract in this case, and then, and not until then, was this policy issued. Then was it first "Delivered for use." 4 Words and Phrases 3780; Jefferson Standard Life Ins. Co., v. Wilson, 260 Fed. 593; Logsdon v. Supreme Lodge of Fraternal Union of America, 76 Pac. 292, 293; Paine v. Pacific Mutual Life Ins. Co., 51 Fed. 689, 693; Equitable Life Assurance Co., v. McElroy, 83 Fed. 631, 642. The date of this policy therefore differed from the date of its issue. The former was August 23, 1915, and the latter was September 13, 1915.

Not only this, but the parties to this policy expressly agreed when this policy was issued that the date of the policy and its date of issue should be at different times. They agreed that the policy should not take effect, and that was an agreement that its date of issue should not be, until it was delivered to and received by the insured during his continuance in good health, and that was not until the 13th day of September, 1915.

Nor was this all of their clear agreement upon this subject. They further expressly agreed that the date of the policy
114 should be a date different from and earlier than the date of its issue. They agreed that "The applicant, upon request, may have policy antedated for a period not to exceed six months." Pursuant to that provision the applicant requested and the insurance company granted its request to antedate the policy to August

23, 1915. Here was an agreement that the date of the policy should be anterior to—that it should be before some date. What date was the date of the policy to be before? The unavoidable answer is that it was to be before, to be anterior to "its date of issue."

So it is that the incontestability clause without ambiguity provides that the policy shall be contestable, not for two years from its date, but for two years from "its date of issue." Its date was August 23, 1915. Its date of issue was September 13, 1915.

The clear purpose and intention of the parties to this policy by the use of this incontestability clause was to give to the company two full years from the closing of the contract to contest the policy. It could not contest it before the policy contract was closed, before there was a contract. By the clear terms of the policy this term of contestability extends two years from the date the policy contract came into existence—two years "from its date of issue."

If that clause be interpreted and enforced as it reads in the policy, the antedating clause is perfectly consistent with it, leaves the contestability clause unmodified, and the company's two years of contestability intact. But if, by construction, a substitution in the incontestability clause of the term "from the date of the policy" for the term "from its date of issue" be made, then the antedating clause which permits the insured to have the policy dated back not more than six months anterior to the date of its issue gives to the insured the option to reduce the company's period of contestability not exceeding six months, to make it eighteen months instead of two years, and the antedating clause thus conflicts with the incontestability clause as the latter is written in the policy, modifies the latter and cuts down the two years of contestability six months at the option of the insured. In this state of the case, since the clauses as they read, are rational, effective, and consistent, a modification of the incontestability clause by the substitution of "from the date of the policy" for "from its date of issue," does not seem to be required or permissible, nor am I able to believe that the
115 parties to this contract ever intended to make the contract which such a modification would create. General rules of construction are that all the words and terms of a contract should have effect if possible and none should perish by construction, and that where a contract is susceptible of two constructions—one of which makes the different parts of it accordant, and another which makes them discordant—the former should be preferred, because it cannot be assumed that the parties intended to insert inconsistent provisions. Burdon Central Sugar Refining Co. v. Payne, 167 U. S. 127, 142; Miller, et al. v. Hannibal & St. Joe R. R. Co., 90 N. Y. 430, 433; Barhydt v. Ellis, 45 N. Y. 107, 110. If the contestability clause and the antedating clause be enforced as the parties wrote them without the change of the former "from its date of issue" to "from the date of the policy," that clause and the antedating clause are consistent. Every word of each of the clauses has its normal effect without impairing or modifying any of the terms of the other and none of the words or terms of either perish by

construction. If, by construction, the term "from its date of issue" be changed to "from the date of the policy" the two clauses conflict, the two years of contestability the parties undoubtedly intended to secure to the company are reduced to twenty-three months and ten days, and some of the clear terms of the contestability clause perish by construction.

Again, when the parties to this policy came to make this contract they had the perfect right to agree that the two years of contestability should run from the date of the policy or from "its date of issue." The two dates were not the same, they knew these facts, the Insurance Company had adopted a policy which permitted the insured to have that policy dated not exceeding six months earlier than "Its date of issue" and had expressly agreed that the company should have the right to contest its policy for fraud for two years after "its date of issue.' The permission to date back the policy by the clear terms of the contract as it then read did not and could not modify or impair the right of the company to the full two years of contestability from the date of the issue of the policy, from the time when the contract was first made. The insured accepted the policy contract so reading, and in my opinion the parties to that contract are legally bound by and should be held to its terms.

116 For the reasons which have now been stated, the contract and the facts of this case have failed to satisfy my mind that this court should substitute by construction for the words "from its date of issue" in this policy, the words "from the date of the policy," reduce the two years of contestability from the date of the making of the contract which the policy seems to me to have been intended to secure, and which, it seems to me, it did secure to the company to 23 months and 10 days, and thereby deprive the company of the defense of fraud in the procurement of this policy, which it has if its period of contestability under the policy was two years from "its date of issue" which was the date the contract was made.

[Endorsement omitted.]

117 **(JUDGMENT.)**

[Filed Apr. 4, 1922.]

[Title omitted.]

In Error to the District Court of the United States for the Northern District of Iowa.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Iowa, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that the

Hurni Packing Company have and recover against the Mutual Life Insurance Company of New York the sum of twenty dollars for its costs herein and have execution therefor. April 4, 1922.

118 **(CLERK'S CERTIFICATE.)**

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Northern District of Iowa as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein the Mutual Life Insurance Company of New York, was Plaintiff in Error, and the Hurni Packing Company, was Defendant in Error, No. 5790, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this tenth day of June, A. D. 1922. E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eigth Circuit. [Seal of the United States Circuit Court of Appeals, Eighth Circuit.]

119 [Title omitted.]

RETURN TO WRIT OF CERTIORARI.

[Filed Nov. 10, 1922.]

It is hereby stipulated that the transcript already filed, in the clerk's office of the Supreme Court of the United States, with the petition for the writ of certiorari, be taken as a return to said writ, dated the 26th day of October, 1922.

Dated November 6, 1922. G. T. Struble, R. L. Read, and Frederick L. Allen, Counsel for Mutual Life Insurance Company of New York. Edwin J. Stason, Charles M. Stillwill, Counsel for Hurni Packing Company.

[Endorsement omitted.]

120 **WRIT OF CERTIORARI.**

[Filed Nov. 13, 1922.]

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Mutual Life Insurance Company of New York is plaintiff in error, and Hurni Packing Company is defendant in error, No. 5790, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Northern District of Iowa, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do
121 hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and twenty-two. Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[Endorsement omitted.]

122 **RETURN TO WRIT.**

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of Mutual Life Insurance Company of New York, Plaintiff in Error, v. Hurni Packing Company, No. 5790, is a full, true and complete transcript of all the pleadings, proceedings and record entries in said cause as mentioned in the certificate thereto.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this tenth day of November, A. D. 1922. E. E. Koch, Clerk U. S. Circuit Court of Appeals for the Eighth Circuit. [Seal of the United States Circuit Court of Appeals, Eighth Circuit.]

123 [Endorsement omitted.]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

VS.

HURNI PACKING COMPANY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

The petition of The Mutual Life Insurance Company of New York respectfully shows to this Honorable Court as follows:

1. The petitioner, The Mutual Life Insurance Company of New York, is a corporation organized and existing under and by virtue of the laws of the State of New York and is a citizen and resident of said State, having its office and principal place of business at No. 32-34 Nassau Street, Borough of Manhattan, New York City, and is duly authorized to transact the business of life insurance in the State of Iowa.

2. The respondent, Hurni Packing Company, is a corporation duly organized and existing under the laws of the State of Iowa and is a citizen and resident of said State, having its principal place of business in the city of Sioux City, Iowa.

3. On the 2nd day of September, 1915 one Rudolph Hurni made a written application to the petitioner, dated that day, (Record p. 8) for a policy of life insurance to be issued by the petitioner on his life, for $25,000.00, on the ordinary life plan, premiums to be paid annually, in favor of the respondent, Hurni Packing Company, of which the said Rudolph Hurni was President and General Manager. (Record p. 6.)

4. On September 3, 1915, the said Rudolph Hurni was examined by a medical examiner of the petitioner (Record p. 34), and on September 7, 1915 (the application having been

accepted) the policy was signed by the officers of the petitioner (Record p. 76), and on September 13, 1915, the policy was delivered to Rudolph Hurni, the insured, in the State of Iowa (Record p. 76); but the policy, at the request of the insured noted on the original application, was dated back to August 23, 1915 (Stipulation of Facts, Record p. 76).

5. On July 4, 1917, Rudolph Hurni, the insured, died in Sioux City, Iowa (Record, p. 27).

6. On August 19, 1917, the petitioner was furnished with proofs of death (Petition, Record p. 2; Answer, Record, p. 13).

7. On August 24, 1917, the petitioner, by a letter dated and mailed on that day, addressed to the Hurni Packing Company of Sioux City, Iowa, (the beneficiary named in the policy), declined payment of the claim under the policy. (Record, p. 81.)

8. On August 28, 1917, an action was commenced against your petitioner by the respondent in the Disrtict Court in and for Woodbury County, Iowa, to recover under the policy. (Record, p. 77.)

9. On November 5, 1917, an order was entered by the State court removing the cause from the State court to the U. S. District Court for the Northern District of Iowa, Western Division. (Record, p. 12.)

10. On November 12, 1917, the petitioner made a written tender to the respondent of $2150.00, being the amount of premiums paid on the policy up to the date of the insured's death, together with interest thereon from the date of payment to the date of tender, which was refused. (Record, p. 20.)

11. On December 3, 1917, the removal of said cause was duly perfected by filing a transcript of the record, pleadings and proceedings in the State court in the cause, in the office of the clerk of the U. S. District Court for the Northern District of Iowa, Western Division. (Record, p. 1.)

12. On December 13, 1917, the petitioner filed its answer in said U. S. District Court, in which it denied that the policy was ever a valid or binding contract of insurance or that the petitioner was liable to respondent thereon, and, among other things, set up affirmatively that the said policy was procured by said Rudolph Hurni through fraud, deceit, misrepresentation and concealment, in that said Rudolph Hurni made untrue statements and false representations and practiced fraudulent concealment in the application to the petitioner for the issuance of the policy in suit, upon which the petitioner relied and was thereby deceived. (Record, pp. 13-19.)

13. The above cause came on for trial in said District Court of the United States on the 16th, 17th, 18th and 19th days of October, 1918, and both plaintiff and defendant submitted motions for a verdict to be directed by the trial court. The trial court thereupon granted the motion of the plaintiff

and overruled the motion of the defendant and directed a verdict in favor of the plaintiff and against the defendant for Twenty-five thousand dollars ($25,000), together with interest and costs.

14. Thereafter, the petitioner, The Mutual Life Insurance Company of New York, sued out a writ of error in the United States Circuit Court of Appeals for the Eighth Circuit to review said judgment of the District Court, and such proceedings were duly had in said Circuit Court upon said writ of error that the judgment of the District Court was reversed and set aside, and it was held by said Circuit Court of Appeals as a matter of law, that the policy was procured by fraud of the insured and that the trial court should have directed a verdict in favor of the defendant upon the trial. Said cause was thereupon duly remanded to the District Court for further proceedings not inconsistent with the decision and determination of said Circuit Court of Appeals. (260 Fed. Rep. 641.)

15. Thereupon the respondent petitioned this Honorable Court for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, to review the determination of the Circuit Court of Appeals as provided for in Section 240 of the Federal Judicial Code, but this Honorable Court refused to issue such writ of certiorari. 251 U. S. 556, 64 L. Ed. 412.

16. On June 2, 1920, the respondent, Hurni Packing Company, leave of court having first been granted, filed an amended reply to the defendant's answer in said cause, in which it is alleged that the defendant failed to contest the policy of insurance in question within the two year period in which the policy might be contested, as provded by the terms thereof, and is now debarred from setting up and urging any of the defenses set forth in its answer. (Record, p. 22.)

17. Thereupon a second trial of the cause was had in the said District Court, the evidence introduced on this trial being the same as the evidence introduced on the first trial, and at the close of the trial both plaintiff and defendant moved for a directed verdict. The trial judge denied the defenant's motion but granted the motion of the plaintiff, holding the policy sued upon to be incontestable; thereafter a judgment was entered in favor of the plaintiff and against the defendant for the full amount of the policy sued upon, with interest and costs. (Record, p. 25.)

18. Thereafter, and within the time and in the manner required by law, the petitioner again sued out a writ of error in the United States Circuit Court of Appeals for the Eighth Circuit to review the said judgment of the District Court, and the said Circuit Court of Appeals, on the 4th day of April, 1922, affirmed the judgment of the District Court; Circuit Judge Sanborn, however, dissenting. The said Circuit Court of Appeals held that the policy was procured by fraud but

that the petitioner, not having contested the policy within two years from August 23, 1915 (the policy having been antedated as of that date) the policy was incontestable.

19. The said judgment in favor of the respondent and against the petitioner thereby became and now is a final judgment within the meaning of Section 128 of the Federal Judicial Code and therefore is reviewable by this Honorable Court upon writ of certiorari under the provisions of Section 240 of the Federal Judicial Code.

20. A certified copy of the entire record in said case including the proceedings in said United States Circuit Court of Appeals for the Eighth Circuit is herewith furnished, attached to and made a part of this application and petition, and marked Exhibit "A", in compliance with Rule 37 of the rules of this court.

21. Your petitioner further shows that the decision of the said Circuit Court of Appeals is erroneous in the following respects:

(1) Because said Circuit Court of Appeals holds that, notwithstanding it is established as the law of the case that the policy was procured by fraud; and notwithstanding that the policy was not applied for until September 2, 1915, and was not executed by the petitioner until September 7, 1915, and was not actually delivered to the insured until September 13, 1915; notwithstanding that your petitioner had contested its liability under the policy by refusing payment thereon on August 24, 1917; that the two year contestable period nevertheless had commenced to run on August 23, 1915, the date mentioned in the *testimonium* clause in the policy as the date the policy was executed, which was not the actual date of issue, but was a fictitious date inserted in the policy at the request of the insured, and hence the policy was incontestable from and after August 23, 1917, less than two years from the actual date of issue.

(2) Because said Circuit Court of Appeals holds and decides that the right of the petitioner to contest its liability under the policy of insurance in question, on the ground of fraud, can be limited by an arbitrary construction placed upon it to a period of time distinctly and considerably less than the two year period after the date of issue as provided for in the policy itself.

(3) Because said Circuit Court of Appeals holds and decides that, notwithstanding the insured died within the period during which the petitioner is permitted under the terms of the policy to contest its liability and the rights of the petitioner and the respondent are fixed as of the date of the death of said insured, nevertheless the two year period of contestability continues to run, and unless the insurer contests its liability before the expiration of the contestable period, even after the death of the insured, its right to do so is gone.

22. Your petitioner further shows to this Honorable Court that this case involves questions of gravity and general importance,

(a) In that if the decision of the said Circuit Court of Appeals is allowed to stand, policies of insurance that have heretofore been issued by insurance companies generally would be so construed as to deprive the insurance companies of the right to contest, on the grounds of fraud, the validity of the policies, although the companies had contested their liability under the policies within the contestable period, as provided in the policies;

(b) In that it will deprive insurance companies generally of the right to rescind policies although the grounds of recission are well founded in fact, and of the right to defend actions brought to recover on the policies where meritorious defenses actually exist, unless such actions are commenced within a shorter period of time than the time fixed by the policy and which was actually contemplated by the parties at the time the insurance policies were issued;

(c) In that the period of contestability in policies issued by certain companies would be actually so shortened that the policies would in fact be incontestable from the actual date when the policies went into force;

(d) In that the law of insurance with respect to the time when an insurance policy is issued and in force, has been changed by construction of said court so that the policies will be deemed actually in force long before the date they were applied for; and

(e) In that the decision of said Circuit Court of Appeals, to the effect that the date of issue of the policy must be held to be the date mentioned in the *testimonium* clause, a fictitious date which antedated the date of actual issue and delivery of the policy, as the date at which the period of contestability started to run, conflicts with the decision of the Circuit Court of Appeals for the Fifth Circuit, which was decided October 15, 1919, in the case of *Jefferson Standard Life Ins. Co. vs. Wilson,* 260 Fed. 593, where the Circuit Court of Appeals for the Fifth Circuit held that where the policy bore date November 15, 1916, although it had actually been delivered on June 16, 1916, under a premium receipt which had been given for the interim insurance from June 1, 1916, to November 15, 1916, the date of issue was not the date mentioned in the *testimonium* clause of the policy but the date that the policy was actually delivered, to wit, June 16, 1916, and that the contestable period of one year commenced to run June 16, 1916, and not November 15, 1916.

23. Your petitioner further shows that it is advised and therefore believes that the said judgment of the United States Circuit Court of Appeals is a final judgment within the provisions of Section 128 of the Federal Judicial Code and is erroneous and that this Honorable Court should require the

said cause to be certified to it for its review and determination in conformity with the provisions of Section 240 of the Federal Judicial Code.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said cause, entitled Mutual Life Insurance Company of New York, Plaintiff in Error, vs. Hurni Packing Company, Defendant in Error, No. 5790, to the end that the said cause may be reviewed and determined by this court as provided by Section 240, of the Federal Judicial Code, or that your petitioner may have such other or further relief or remedy in the premises as this court may deem appropriate and in conformity with said provision of the Federal Judicial Code, and that the said judgment of the said Circuit Court of Appeals in the said case and every part thereof may be reversed by this Honorable Court.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Petitioner.

By FREDERICK L. ALLEN.....
Its Counsel.

R. L. READ.....
Of Counsel.

VERIFICATION.

STATE OF New York...)
) SS
COUNTY OF New York..)

I, FREDERICK L. ALLEN....., being first duly sworn on oath state:

That I am General Solicitor of the Mutual Life Insurance Company of New York, the above named and described petitioner; that I have read the foregoing petition for Writ of Certiorari, and that the facts and statements therein made are true as I verily believe.

FREDERICK L. ALLEN.

Subscribed and sworn to before me by Frederick L. Allen..... this 27th... day of June, A. D. 1922.

(SEAL)

James J. Dillon.....
Notary Public in and for the State and County aforesaid.

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TABLE OF CASES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

VS.

HURNI PACKING COMPANY, RESPONDENT.

On Petition for Certiorari to the United States Circuit Court of Appeals.

EIGHTH CIRCUIT.

BRIEF AND ARGUMENT OF PETITIONER

STATEMENT.

The Mutual Life Insurance Company is a corporation engaged in the life insurance business and is a citizen of the state of New York. On the 2nd day of September, 1915, Rudolph Hurni, then a resident of Sioux City, Iowa, made application to the Company for a $25,000.00 policy of insurance on his life, to be payable to the Hurni Packing Company as beneficiary. The application was accepted and the policy executed by the officers of the Company in New York on September 7, 1915; and the policy was delivered to the insured at Sioux City, Iowa, on September 13, 1915. In the application it is provided that the applicant may have the policy antedated for a period not to exceed six months. The policy was antedated as of August 23, 1915, at the request of said Hurni.

Hurni died on the 4th day of July, 1917. On August 19, 1917, the Hurni Packing Company furnished proofs of death and demanded payment of the amount of the policy. On August 24, 1917, payment was refused and liability denied by the Insurance Company in a letter from the Insurance Company to the claimant. Thereafter and on August 28, 1917, suit was commenced by the Hurni Packing Company in the District Court of Woodbury County, Iowa, which suit was removed by the Insurance Company on the grounds of diversity of citizenship, to the United States District Court, Northern District of Iowa. The Insurance Company set up as its defense, the procurement of the policy by fraud, misrepresentation and concealment practiced by Hurni. At the close of the trial in the District Court both parties made motion for directed verdicts. The District Court overruled the motion of the defendant and sustained the motion of the Hurni Packing Company. A verdict was directed and judgment entered in favor of the Hurni Packing Company for the full amount of the policy, plus interest and costs. The Mutual Life Insurance Company sued out a Writ of Error in the United States Circuit Court of Appeals, Eighth Circuit, and the said Circuit Court of Appeals reversed the decision and judgment of the District Court, holding the evidence showed without conflict and as a matter of law that the policy was procured by fraud, misrepresentation and concealment, and hence was void; and remanded the case for further proceedings in the District Court not inconsistent with the opinion. (260 Federal Reporter 641.)

The Hurni Packing Company then filed in the Supreme Court of the United States a petition for a writ of certiorari to review the opinion of the United States Circuit Court of Appeals, the petition being denied by said court. (251 U. S. 556, 64 Law Edition 412.)

Thereafter the cause was remanded to the District Court. Just before the second trial was commenced the Hurni Packing Company filed an amended reply, setting up a provision of the policy by reason of which it was claimed the policy was incontestable. A second trial was had and at the close of the trial the District Court again sustained a motion in favor of the Hurni Packing Company for a directed verdict and again entered judgment in its favor for the amount of the policy plus interest and costs; holding the policy was incontestable notwithstanding that the evidence on the merits of the case was the same as on the first trial, and that it was established as the law of the case by the previous opinion of the Circuit Court of Appeals, that the policy had been procured by fraud. From this judgment of the District Court the Mutual Life Insurance Company again sued out a Writ of Error to the United States Circuit Court of Appeals, Eighth Circuit; and on the 4th day of April, A. D. 1922, the said Circuit Court of Appeals rendered

its opinion and decision holding that the policy was incontestable and affirming the judgment of the District Court. From this decision and opinion Circuit Judge Sanborn dissented.

The United States Circuit Court of Appeals adopts and adheres to its first opinion (260 Federal Reporter 641) and holds as the law of the case that it is conclusively established that the policy was procured by fraud; but, notwithstanding, also holds that the policy is incontestable because no affirmative action to contest liability thereunder was made until August 24, 1917, which was one day longer than two years *after the date the policy bears*, which is not the true date of execution but on the contrary is fourteen days prior to the actual date of execution, and twenty days prior to the date of issue. And the said Circuit Court of Appeals likewise holds that notwithstanding that the insured died within less than two years after the date of the policy (Policy dated August 23, 1915, actually executed September 7, 1915, and actually delivered September 13, 1915) the self-imposed limitation in the policy limiting the right to contest liability to a period of two years after the date of issue of the policy makes the policy incontestable from and after August 23, 1917.

THE FACTS.

We confine our statement of the facts shown by the evidence to merely those questions which are material on this submission.

It is conclusively established as the law of this case that the policy was procured by misrepresentation, fraud and concealment. Hence the Insurance Company has a complete defense to the suit unless it is precluded from making such defense by reason of the provision in the policy generally referred to as the "Incontestability Clause."

Whether or not the so-called incontestability clause is effective under the circumstances of this case: that is, in view of the fact that the insured died before the expiration, by lapse of time, of the period within which the Insurance Company admittedly could contest its liability, is purely a matter of law.

The facts shown by the record in relation to the right of the Insurance Company to contest in this suit are as follows:

The policy sued upon contains among other things the following provision:

"INCONTESTABILITY. This policy shall be incontestable except for nonpayment of premiums provided two years shall have elapsed from its date of issue." (Record page 4.)

The original application of Rudolph Hurni upon which the policy in suit was issued, was signed and dated September 2, 1915. At the top of the application there is written in ink: "Date policy August 23, 1915. Age 47." (Record page 5.)

In the application it is provided among other things as follows:

"The applicant upon request may have policy antedated for a period not to exceed six months." (Record, page 5.)

The policy sued on was in fact executed by the signatures of the president and secretary and the countersignature of the registrar of the Mutual Life Insurance Company being affixed on the 7th day of September, A. D. 1915. The date of execution of the policy was inserted as August 23, 1915, it being antedated pursuant to the privilege and option granted in the application. (Record, page 76.)

The policy was actually delivered to Rudolph Hurni on September 13, 1915. (Record, page 76.)

Rudolph Hurni died on the 4th day of July, 1917. (Record, page 2.)

The Hurni Packing Company furnished proofs of death to the Insurance Company on the 19th day of August, 1917. (Record, page 2.) On the 24th day of August, 1917, the General Solicitor of the Insurance Company, conceded to have had full power to act for the Company, wrote a letter to the Hurni Packing Company (which was received by the addressee on August 27, 1917) asserting that because the policy was procured by the fraud of Rudolph Hurni, the Insurance Company denied liability. (Record, pages 76-77.)

Suit was instituted and commenced by the Hurni Packing Company on August 28, 1917, in the District Court of Woodbury County, Iowa; and in such suit the Insurance Company was required to appear and defend at the November, 1917, term of said District Court. (Record, page 77.)

The Insurance Company did appear within the time limited by the summons, and removed the cause to the United States District Court, Northern District of Iowa, and in said cause answered within due time.

A trial on the merits resulted in the decision, now final in the case, that the policy was procured by fraud.

It likewise held that the Insurance Company may not avail itself of this meritorious and complete defense because the policy is said to be incontestable.

DETERMINATION OF THE CASE.

The Circuit Court of Appeals holds:

a.—The policy sued on was obtained by fraud.

b.—That the so-called incontestability clause continues to be operative notwithstanding that Rudolph Hurni died within less than two years from the date of issue of the policy, even if the date be held to be August 23, 1915.

c.—That August 23, 1915, is the date when the two-year period within which the insurance company may contest lia-

bility under the policy commenced to run, notwithstanding that such date, to wit, August 23, 1915, is not actually the date of execution of the policy, and notwithstanding that said date, is not the *date of issue* of the policy, and notwithstanding that by reason of such construction placed upon the policy by the United States Circuit Court of Appeals, the actual period within which the insurance company may contest its liability after the date of issue i. e. the date of delivery of the policy is twenty days less than two years.

d.—That contest of the policy, made Aug. 24, 1917, was one day late, and hence the meritorious defense is not available.

ERRORS ASSIGNED.

Petitioner submits that the United States Circuit Court of Appeals is in error in the following respects:

1. Because said Circuit Court of Appeals holds that, notwithstanding it is established as the law of the case that the policy was procured by fraud; and notwithstanding that the policy was not applied for until September 2, 1915, and was not executed by the petitioner until September 7, 1915, and was not actually delivered to the insured until September 13, 1915; and notwithstanding that your petitioner had contested its liability under the policy by refusing payment thereon on August 24, 1917; that the two-year contestable period nevertheless had commenced to run on August 23, 1915, the date mentioned in the *testimonium* clause in the policy as the date the policy was executed, which was not the actual date of issue, but was a fictitious date inserted in the policy at the request of the insured, and that hence the policy was incontestable from and after August 23, 1917, less than two years from the actual date of issue.

2. Because said Circuit Court of Appeals holds and decides that the right of the petitioner to contest its liability under the policy of insurance in question, on the ground of fraud, can be limited by an arbitrary construction placed upon the policy to a period of time distinctly and considerably less than the two-year period after the date of issue as provided for in the policy itself.

3. Because said Circuit Court of Appeals holds and decides that, notwithstanding the insured died within the period during which the petitioner is permitted under the terms of the policy to contest its liability, and notwithstanding the rights of the petitioner and the respondent are fixed as of the date of the death of said insured, nevertheless the period of contestability continues to run, and unless the insurer contests its liability before the expiration of the contestable period stipulated in the policy, regardless of the death of the insured, its right to do so is gone.

BRIEF OF THE ARGUMENT.

I.

The date of issue of the policy was September 13, 1915; certainly not prior to September 7, 1915.

Jefferson Standard Life Ins. Co. vs. Wilson, 260 Fed. 593;
Logsdon vs. Supreme Lodge, 76 Pac. 292, 293;
Paine vs. Pacific Mutual Life Ins. Co., 51 Fed. 689, 693;
Equitable Life Assurance Co. vs. McElroy, 83 Fed. 631, 642;
Spencer vs. Meyers, 26 N. Y. Supp. 371, 375;
Words and Phrases, Vol. 4, page 3780.

Hence the period of contestability did not expire until September 13, 1917.

II.

General rules of construction are that all the words and terms of a contract should have effect, if possible, and none should perish by construction, and where a contract is susceptible of two constructions—one of which makes the different parts of it accordant, and another which makes them discordant,—the former should be preferred because it cannot be assumed that the parties intended to insert inconsistent provisions.

Burdon Central Sugar Refining Co. vs. Payne, 167 U. S. 127, 142;
Miller, et al. vs. Hannibal, etc. Co., 90 N. Y. 430, 433;
Barhydt vs. Ellis, 45 N. Y., 107, 110.

III.

Fraud is abhorrent to the law and the courts will never knowingly assist in the consummation of a fraud.

IV.

The death of the insured matures a life insurance policy and the rights of the parties thereto become fixed at such time. A policy containing a clause limiting the right to contest after a certain period of time is or is not contestable after the death of the insured, depending upon whether or not the period of contestability as fixed by the policy has expired at that time.

ARGUMENT.

First and Second Grounds of Petition:

> "Because said Circuit Court of Appeals holds that,—notwithstanding it is established as the law of the case that the policy was procured by fraud; and notwithstanding that the policy was not applied for until September 2, 1915, and was not executed by the petitioner until September 7, 1915, and was not actually delivered to the insured until September 13, 1915; notwithstanding that your petitioner had contested its liability under the policy by refusing payment thereon on August 24, 1917, and thereafter by sustaining its defense based on fraud in the procurement of the policy;—the two year contestable period nevertheless commenced to run on August 23, 1915, the date mentioned in the *testimonium* clause in the policy as the date the policy was executed, which was not the actual date of issue but was a fictitious date inserted in the policy at the request of the insured, and hence the policy was incontestable from and after August 23, 1917, less than two years from the actual date of issue."

The question presented is essentially one of construction of the contract.

In view of the plain wording of the contract it would reasonably seem that it is not subject to construction contrary to its plain meaning as expressed by the wording of it. But the United States Circuit Court of Appeals has construed the policy so as to give it an effect other and different than the effect evidently contemplated by the parties to the contract.

The clause in question reads as follows:

> "INCONTESTABILITY: This Policy shall be incontestable except for nonpayment of premiums, *provided two years shall have elapsed from its date of issue.*"

The foregoing clause limiting as it does the right of the insurer to contest its liability under the policy on the ground of fraud, is a self imposed limitation of right; because ordinarily one always has the right to contest liability on the ground of fraud.

Being a self imposed limitation, and being purely for the benefit of the insured, it is inconceivable that the clause should be so construed as to inflict a further or greater limitation on the rights of the insurer than clearly arises from the plain wording and meaning of the clause itself. Yet by the opinion of the Circuit Court of Appeals, the clause is so construed as to reduce the period of contestability to less than two years; to a period of one year, eleven months and ten days in fact.

The application for the policy was made September 2, 1915. The policy was antedated to August 23, 1915, in order to give the applicant for insurance a more favorable age rating, and hence reduce the amount of the premium he would be required to pay.

The testimonium clause of the policy is as follows:

> "In Witness Whereof, the Company has caused this Policy to be *executed* this 23rd day of August, 1915."

There is an evident difference between the date of execution of the policy and the date of issue. Such is the inevitable construction to be placed upon the policy in view of the provisions of the application (which are made a part of the policy), and of the policy itself. The application provides, among other things, "The proposed policy shall not take effect unless and until the first premium shall have been paid during my continuance in good health, and unless also the policy shall have been delivered to and received by me during my continuance in good health; * * *" (Record page 5).

The commencement of the running of the two year period of the right to contest is expressly stated as the *date of issue* of the policy. Thus the date of issue is specifically differentiated in the policy itself from the date of signature; that is, the date of execution. The Company caused the policy to be executed by the signatures of its officers on September 7, 1915, and dated as of August 23, 1915. The policy was not issued until the date of delivery of it to the insured, which it is conceded was September 13, 1915.

It is held and decided by the United States Circuit Court of Appeals that a proper contest of liability under the policy was made by the Insurance Company on August 24, 1917. Hence, if the right to contest the policy did not expire until September 13, 1917, the contest was seasonably made; and it being also held and decided as the law of this case that the policy was procured by fraud, it follows that the Insurance Company may not be subjected to liability in this case if its right to contest existed after August 23, 1917.

To determine the expiration of the contestability period it is necessary only, in this case, to determine the time when the period of contestability commenced to run.

The beginning of the contestability period is expressly fixed in the policy as the "date of issue" of the policy; and the duration of that period is fixed as two years.

What is the general meaning of the word "issue". We quote from the dissenting opinion of Circuit Judge Sanborn:

"Issue means 'to deliver for use.' A policy is not issued when it is dated and signed by the officers of the Company, nor until it has been delivered to and accepted by the insured. The application for it is a request for a policy, the policy is a proposal of the company to insure on the terms specified therein, the receipt and acceptance of such a policy by the insured first closes the contract. Until that acceptance there may be negotiations but no contract. Upon such receipt and acceptance on September 13, 1915, and not before, was there a contract in this case, and then, and not until then, was this policy issued. Then was it first 'Delivered for use.' 4 Words and Phrases 3780; *Jefferson Standard Life Ins. Co. vs. Wilson*, 260 Fed. 593; *Logsdon vs. Supreme Lodge of Fraternal Union of America*, 76 Pac. 292, 293; *Paine vs. Pacific Mutual Life Ins. Co.*, 51 Fed. 689, 693; *Equitable Life Assurance Co. vs. McElroy*, 83 Fed. 631, 642. The date of this policy therefore differed from the date of its issue. The former was August 23, 1915, and the latter was September 13, 1915."

To "issue" means, "to put forth," "to emit," "to give effect to," "to deliver for use," "delivery".

Sisk vs. Ins. Co., 45 N. E. at 805;
Webster's Dictionary.

The "date of issue" was the date of delivery of the policy to Hurni, which is admitted to have been September 13, 1915.

Spencer vs. Meyers, 26 N. Y. Supp. 371 at 375;
Words and Phrases, Vol. 4, page 3780.

Quite clearly the Insurance Company intended to reserve to itself a period of two years from the time it entered into the contract and within which it would have the right to contest its liability under the policy. Undoubtedly it would have the full period of two years within which to contest, unless it by some act, some course of conduct in the way of a waiver which amounts to an estoppel, has given justification for holding that the two year period shall be lessened. The only possible ground for so holding is the fact that the policy was antedated at the request of the insured.

We submit that no sufficient grounds are shown which will justify such a construction of the contract.

It is a fundamental rule of construction of a contract that all the words, terms and provisions thereof, shall be given effect, if possible, and (we quote again from the dissenting opinion of Circuit Judge Sanborn):

"where a contract is susceptible of two constructions—one of which makes the different parts of it accordant, and another which makes them discordant—the former should be preferred, because it cannot be assumed that the parties intended to insert inconsistent provisions. *Burdon Central Sugar Refining Co. vs. Payne*, 167 U. S. 127, 142; *Miller, et al. vs. Hannibal & St. Joe R. R. Co.*, 90 N. Y. 430, 433; *Barhydt vs. Ellis*, 45 N. Y. 107, 110."

When the parties to this contract of insurance came to make it they knew that the date to be inserted in the policy as its date of execution was not to be the same as the date of issue. The application was not made until September 2, 1915. The policy had to be executed at the Home Office of the Company in New York, and was so executed on September 7, 1915. It then had to be forwarded to Sioux City, Iowa, for delivery, and it was forwarded and was delivered September 13, 1915. Both parties to the contract had agreed that the policy should be antedated, and had agreed that the policy should not be in force until it was delivered. It therefore was agreed that the date of the policy should be anterior to the date of issue. It never was agreed by the parties that the date of issue, namely; the date of delivery should be the same as the date of excution. Such an agreement would have been impossible of fulfillment because obviously the policy could not be issued on August 23, 1915, that date being more than one week prior.

The parties had a perfect right to agree that the two-year contestability period should begin to run either (1) from the fictitious date of the policy, or (2) from the date of the policy was actually executed, or (3) from the date when the policy was actually delivered. They knew that the fictitious date of the policy could not be the date the policy was actually executed nor the date that the policy could be delivered. In fixing the date when the contestable period should commence to run, they used a different expression, to wit, "date of issue," but it was provided in the application (Hurni's proposal for a policy) that the policy should not take effect "unless delivered" to the applicant. (Record p. 5.) Manifestly, the policy was not issued until it was in force. It is clear then, that the parties used the words "date of issue" to mean the date of delivery, i. e. the date when the policy might become a binding contract. The insured having accepted the insurance contract in that form, was bound by it; and therefore the policy could not be "issued" until it was delivered.

To hold otherwise is to read out of the policy contract, by an arbitrary construction not justified by any ambiguity or inconsistency in the contract, the plain provision reserving unto the insurer two years within which to contest liability, after the date of issue of the policy; that is, after the policy might

become a binding contract; and is to reduce the period of contestability against fraud to a period of twenty-three months and ten days. About the only justification for this construction of the policy advanced by the two Judges of the Circuit Court of Appeals who concurred in the majority opinion, is the thought that an insurance policy must be construed in favor of the insured and against the insurer.

It is the law of this case that the policy was procured by fraud. (260 Fed Rep. 641.) We submit that under such circumstances the courts should refuse a construction which sustains a fraudulent claim unless the conclusion is unescapable. Fraud is abhorrent to the law, and justly so. By the decision of the United States Circuit Court of Appeals there is fixed upon the Insurance Company a liability bottomed on fraud; and in order to reach this result the court has construed the policy so as to make ineffective some plain provisions of it, and without any justification other than the statement that the policy contained ambiguities and that the ambiguities would be construed favorably to the insured notwithstanding that to do so is to fix upon your petitioner liability under a fraudulent claim.

Third Ground of Petition:

The Incontestability Clause of the Policy never became effective for the reason that Hurni did not live two years after the date of the policy.

The clause in question reads as follows:

> "INCONTESTABILITY: This policy shall be incontestable except for nonpayment of premiums, provided two years shall have elapsed from its date of issue."

It is not ambiguous. It manifestly is intended to secure the policyholder against every defense, after the lapse of two years from its date of issue, that is after the date when the policy might become a binding contract.

There is a line of authorities holding that such a clause is effective notwithstanding the policyholder may die before the expiration of the two year contestability period, or whatever period may be named. It is this rule of construction that we attack as erroneous; *and we contend that under the clause in question, the policyholder must have lived until the expiration of the period in order to make the policy incontestable.*

The question involved in this case is one of general commercial law and therefore this court is in no way bound or constrained to follow any state decision, ~~hence in considering and deciding this question is not embarrassed by any decision~~

~~of any other Federal Court of inferior, coordinate or superior jurisdiction. The question apparently never has been expressly decided by any Federal Court, (except the court below), though it has, in one case, been mentioned incidentally.~~ The question of law involved in this case has been passed upon by the Circuit Court of Appeals for the 5th Circuit and its determination is contrary to that of the court below. (*Jefferson Life vs. Wilson*, 260 Fed. 593.)

There is no doubt that in numerous cases, in both Federal and State Courts, the question was involved and passed over *sub silentio*. If our opponents are right in their contention in this case, then other Courts in many cases have given wrong judgments in favor of insurance companies whose good defenses should have been ignored, because the contestable period had expired. Is it possible that so many courts and litigants have been mistaken concerning so important a matter?

It will be conceded by all, we think, that the incontestability clause cannot reasonably be given a strictly literal construction in order to fix the date when the contestability period expires. If it were given a literal construction it would often operate to terminate a litigation in the very midst of a trial. "This policy shall be incontestable * * * provided two years shall have elapsed from its date of issue." If these words were given their literal meaning and the two year period of contestability happened to expire while a trial was in progress, the plaintiff's counsel might rise and suggest to the court that two years having ust now expired the policy was no longer contestable and that therefore the defendant's defenses were no longer available and that judgment should be given for the plaintiff. But everybody will admit that such a procedure would be a plain absurdity. It can therefore be most confidently affirmed that the incontestability clause is not to be construed literally with respect to when the contestability period expires.

Since the incontestability clause cannot be literally construed, in the respect above mentioned what rule of construction should be adopted? Manifestly, the clause should be given a reasonable construction, such a construction as will most nearly effectuate the intention of the contracting parties. What more sane and rational meaning can be found for the clause than that its applicability shall depend upon the status of things at the death of the insured? The death of the insured is the capital event in the existence of a life insurance contract. What was before an aleatory contract with an uncertain maturity date has by death become a fixed and matured obligation. The risk no longer exists. The uncertain has become certain. All the rights of both parties to the contract have become fixed and crystalized.

But a literal construction is precisely what the plaintiff in the case at bar is contending for. Such construction ignores the fundamental fact that in case of a life insurance policy, the death of the insured is the crucial and decisive fact determining the rights and duties of the contracting parties.

There are many cogent reasons why it may be said that it is the intention of the parties to the contract of insurance (these parties being the insurer and the assured) that the assured must live two years in order to make the incontestable clause operative. Against these many reasons there can be advanced no reason to support any other conclusion except that generally speaking, a policy will be construed in case of an ambiguity, against the insurance company and in favor of the claimant. That there may have been in the past and perhaps is now in many cases, a good reason for adopting such a construction, does not lend any weight to the point. In the class of cases such as the instant case, there exists no reason for applying a harsh rule of construction of a written contract against the party who is chiefly responsible for its preparation.

In the instant case no single reason can be advanced by the claimant under the policy for holding the policy incontestable except that to do so would permit it to recover under the policy, notwithstanding the fact that the policy was procured by fraud, misrepresentation and concealment. The incontestability clause is asserted by the claimant solely for the purpose of obtaining an advantage which in no other way it could obtain. It is asserted for the purpose of winning a case which it otherwise has lost; of establishing a judgment on what is not a claim of right, but a technicality.

Even if as a general rule the Courts are to hold that the incontestability clause is operative, notwithstanding that the assured has not lived through the contestability period, yet there always should be, and in fact must be, to effectuate justice, exceptions to the general rule. These exceptions must be taken into consideration by the Courts if the Courts are to administer justice so far as it is within human power to do so.

Here we have established as a matter of law and fact that this policy sued upon was obtained by fraud. Here we have, at the eleventh hour, a claim of incontestability asserted by the plaintiff; asserted so as to defeat the established and complete defense to the policy; one which could be defeated in no other way.

There would seem to be a certain injustice tainting such a procedure.

The main error in those decisions holding the incontestability clause as effective notwithstanding the death of the as-

sured during the contestable period, is in failing to differentiate as we have hereinbefore suggested, between the policy of insurance, as such, and the obligation arising therefrom between the claimant and the insurer after the death of the assured.

A contract of insurance necessarily imports, among other things, a so-called "risk". Where there is no risk, there can be no insurance. After the insured is dead, there is no longer any risk. What before was a hazard and an uncertainty, becomes a certainty. Upon the death of a person whose life is insured, the rights under the policy become fixed. The contract is no longer one of insurance, and no longer a contract between the insurer and the insured. There may or may not be a fixed obligation between the insurer and the beneficiary.

Risk and insurance are strictly correlative. Insurance cannot exist without risk, and upon cessation of the risk, the insurance ceases to exist as such.

When an insurance company enters into a contract of insurance with a policyholder, it thereby undertakes the risk of insuring his life. It undertakes to pay the sum named in the policy, to the beneficiary upon the contingency of death, and provided the policy is then in force. Such is the general character of the contract in its inception.

The various clauses of the average insurance policy have to do strictly with the undertaking between the insurer and the insured. There is only one clause in fact that affects the beneficiary. That is the agreement to pay.

The incontestable clause for instance, is a clause which we contend clearly shows was intended to relate to the insurer and the insured only, because it is a clause which pertains strictly to the risk. It is a clause which has to do with the contract as a policy of insurance, which always involves a risk. In other words, it is the undertaking of the insurance company that, provided it continues to insure against the risk for a period of two years after the policy is issued, it thereafter may make no defense against a claim under the policy. It is obvious from this point alone that the risk must continue for the period of two years, or whatever period may be named. If the risk, that is, the policy of insurance does not continue in force for two years, under the conditions of its inception, then the incontestability clause does not and cannot become effective.

To state the proposition another way:

The insurance company limits its right to cancel or rescind the policy for any reason whatsoever except the nonpayment of premiums, to a period of two years, provided the policy exists as a policy for that time. After two years have elapsed from the date of issue, the policy cannot be rescinded except for the nonpayment of premiums; and in the event of the death of the assured, the obligation to pay becomes absolute.

By far the greater weight of authority holds that the so-called "Incontestability Clause" precludes the defense of fraud in the inception of the policy. Hence the insurer is limiting itself to a period of two years within which it could set up the defense that the policy never became effective on account of fraud in the inception of the contract.

It is obvious that the insurance company intended to reserve to itself the privilege of investigation to determine whether or not it desired to continue the risk. The period of time during which it might investigate, is limited to two years. It goes without saying, that the investigation which, impliedly at least, the Insurance Company reserved the right to make, with the right to rescind, in the event that it decided to do so, could not ordinarily be as well or completely made if the assured should be dead. This proposition needs no elaboration.

If the assured dies before the two year period of contestability, (and incidentally the period wherein investigation could be made), the Insurance Company is almost certain to be precluded by his death from being able to make as full and complete an investigation as if the assured were alive and able perhaps to answer questions or be under observation. Therefore, to hold the Incontestability Clause as becoming effective notwithstanding that the assured does not live for two years, is certainly to deprive the Insurance Company of a right; a right which the Insurance Company by its own act had limited in its operation, because it goes without saying that without the limitation, the Insurance Company could at all times contest a policy for fraud in the inception of it.

It seems manifestly unjust and inequitable, that where the Insurance Company has so limited its right of cancellation and rescission, that it should be put to a further limitation of its rights in the premises, by depriving it of possibly the most important avenue of investigation that might be open to it, viz.; the opportunity of further examining and interrogating the assured or observing his conduct, etc.

The self imposed limitation of right ought not to be shortened in the slightest degree by any rule of construction of the Courts, particularly where it is very apparent from the contract itself, that the Insurance Company did not intend to limit its right of contestability unless the assured, the other contracting party in respect to the policy of insurance, should remain a party to the contract for two years or whatever the period of limitation might be.

We submit the foregoing as illustrative of the error in the decisions which hold a contrary rule than the one for which we contend. We say there never was a contract with the beneficiary that the policy should ever be incontestable. We say that there was a contract with the assured that the policy

should be incontestable provided the contract relationship existed between the insurer and the assured for the period of two years. We say that to hold otherwise is to do violence to ordinary principles of justice, and is to construe a contract partially against one of the parties thereto, and without justification from any known rule of construction.

* * * *

We submit that the foregoing construction of the contract is much more logical, fair and just, than the construction which holds that the incontestability clause is effective notwithstanding that the assured dies within the two year period. We cannot support this argument by authorities directly in point. There are decisions holding contrary to our position. These we challenge as unsound in reasoning and as unjust in results.

THE IMPORTANCE OF THE QUESTIONS INVOLVED.

If the decision of the United States Circuit Court of Appeals is allowed to stand, policies of insurance that have been issued and are outstanding may be construed so as to deprive the insurance companies which have issued them of the right to contest on the grounds of fraud, although such companies contest their liability under the policy within the true contestable period as provided by the policy.

We venture to say there are thousands of policies which will be affected or which may be affected by the decision in this case. The life insurance business is one of the greatest businesses of this country. The decision in this case affecting as it does the rights of the insurance companies, and also the rights of the holders of insurance policies, is one affecting so many different people and such great interests that it is a matter of national importance that the question be determined one way or the other with finality.

Depending on their inherent right to contract, insurance companies have issued policies containing some provisions, at least, decidedly against their own interests. In many cases the provisions of the policies are fixed by law. The particular provision involved in the instant case whereby the right of the insurance companies to contest their liability on the ground of fraud or upon any ground except for the nonpayment of premiums is either a voluntary act on their part or is the result of some statutory provision.

It is never the policy of courts to assist in the consummation of a fraud; hence it should not be, and is not in fact the policy of courts to deprive any one of the defense of fraud. This is as it should be. Hence, the decision in this case, shortening by arbitrary construction the period of time within which an insurance company may contest its liability un-

der an insurance policy issued by it, on the grounds of fraud, actually does assist in the consummation of a fraud and the fixation of a fraudulent claim in any case where fraud actually exists.

In the instant case, it is decided by the very court which permits recovery that the policy was obtained by fraud. It is decided that a merely fictitious date in an insurance policy solely for the benefit of the insured is to be taken as the date of issue of the policy when in fact such date is not the date of issue. In this respect the decision is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit as indicated by its opinion in the case of *Jefferson Standard Life Insurance Company vs. Wilson*, 260 Federal 593.

The sound and well reasoned dissenting opinion of Circuit Judge Sanborn, in the court below in this case raises substantial doubts as to the correctness of the majority opinion, and this case will undoubtedly be considered by many as not being a final decision nor one which ought to stand; hence will be productive of further litigation as long as the questions involved are not definitely and finally settled.

Also it is held by the court below that the contestability period continues to run notwithstanding the insured dies before the expiration of the period fixed. This question has never been passed upon by this court, and its importance in the business of life insurance must be conceded.

For these reasons, we urge that this is a case which ought to be reviewed by this Honorable Court so that the matters and questions involved may be definitely and finally settled. Vast interests are involved in the rules of law announced by the decision of the Circuit Court of Appeals, and the question thereby is made to be one of national importance.

CONCLUSION.

The petitioner respectfully urges this Honorable Court to consider, as a part of this argument, the opinion of Circuit Judge Sanborn wherein he dissents from the opinion of the majority of the court. The questions considered by Judge Sanborn are treated so ably, and the argument he advances in support of his opinion is so sound and so clearly and logically stated that his opinion is as strong an argument as could be made on those points. Judge Sanborn's opinion is not reprinted in this argument, but will be found in the transcript of the record filed in this proceeding.

We respectfully submit that the United States Circuit Court of Appeals was in error in rendering the decision it did, and that its decision should be reviewed because of such error

and because the case presented is one of such importance that it ought to be reviewed by this Honorable Court.

Respectfully submitted,

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AUTHORITIES.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 454.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

vs.

HURNI PACKING COMPANY, RESPONDENT.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

BRIEF FOR PETITIONER.

Statement of the Case.

This action was brought against the Mutual Life Insurance Company (a citizen of New York), hereinafter called the defendant, by the Hurni Pack-

ing Company (a citizen of the State of Iowa), hereinafter called the plaintiff, to recover as beneficiary the amount named in a policy of life insurance for $25,000, issued by the Insurance Company on the life of one Rudolph Hurni. The policy was applied for on the 2d day of September, 1915, but was antedated as of August 23, 1915 at the request of the applicant. Rudolph Hurni died on the 4th day of July, 1917. The action was commenced on August 28, 1917 in a District Court of Iowa, and was removed by the defendant on the ground of diversity of citizenship to the United States District Court, Northern District of Iowa.

At the close of the trial in the District Court each party moved for a directed verdict. The District Court overruled the motion of the defendant and granted the motion of the plaintiff. A verdict was directed and judgment entered in favor of the plaintiff for the full amount of the policy. On writ of error to the United States Circuit Court of Appeals, Eighth Circuit, that Court reversed the judgment, holding that the evidence showed without conflict and as a matter of law that the policy was procured by fraud, misrepresentation and concealment, and hence was void. The case was remanded for further proceedings in the District Court not inconsistent with the opinion. (260 Federal Reporter, 641.)

The plaintiff then filed in this court a petition for a writ of certiorari, which was denied. (251 U. S., 556.)

The plaintiff then filed an amended reply, setting up for the first time a provision of the policy providing a two-year limitation from the "date of issue" on the right to contest liability and it therefore claimed that the defense of fraud was no longer available to defendant. A second trial was had, the evidence being substantially the same as the evidence on the first trial. At the close of the evidence, each party moved for a directed verdict. The motion of the defendant was overruled. The motion of the plaintiff was based solely on the ground that the policy was incontestable. A verdict was directed in its favor.

To review this judgment the defendant sued out a writ of error in the United States Circuit Court of Appeals, Eighth Circuit. On April 4, 1922, the Circuit Court of Appeals, while reaffirming its previous decision to the effect that the policy had been procured by fraud, held that the policy was incontestable. From the opinion of the majority, concurred in by Lewis, Circuit Judge, and Van Valkenburgh, District Judge, Circuit Judge Sanborn dissented in an opinion. (280 Federal Rep., 22.)

Material Facts.

(1.) *On the Issue of Fraud.*

While the fraud in the procurement of the policy is not in dispute yet the facts may be briefly stated.

The policy sued on was issued pursuant to an

application made by Rudolph Hurni on the 2d day of September, 1915,

Among other things, the application contains the following provisions.

> "This application is made to the Mutual Life Insurance Company of New York. All the following statements and answers, and all those that I make to the Company's Medical Examiner, in continuation of this application, are true, and are offered to the Company as an inducement to issue the proposed policy. * * * The proposed policy shall not take effect unless and until the first premium shall have been paid during my continuance in good health, and unless also the policy shall have been delivered to and received by me during my continuance in good health."

The evidence showed that Hurni made the following statements and representations to the Medical Examiner, which were recorded in his report and formed part of Hurni's application.

> "18. What illnesses, diseases, injuries or surgical operations have you had since childhood?
>
> Name of disease, etc.: Pneumonia.
> Number of attacks: One.
> Date of each: Fall 1899.
> Duration: 3 weeks.
> Severity: Moderate.
> Results: Good.

Date of complete recovery? Don't remember date.

19. State every physician or practitioner who has prescribed for or treated you or whom you have consulted in the past five years.

Name of physician or practitioner: None consulted.

Address: ——.

When consulted: —— —, ——.

Nature of complaint: Give full details above under Q. 18.

20. Have you stated in answer to question 18 all illnesses, diseases, injuries or surgical operations which you have had since childhood? (Ans. yes or no.) Yes.

21. Have you stated in answer to question 19 every physician and practitioner consulted during the past five years and dates of consultation? (Ans. yes or no.) Yes.

22. (*a*) Are you in good health? Yes.
(*b*) If not, what is the impairment?"

The testimony shows without contradiction that Hurni had frequently consulted, and had been prescribed for and received medical treatment from Dr. C. E. Clingan, a practicing physician of Sioux City, Iowa, during the period from 1910 to 1915 inclusive. (See Trans., commencing page 22, testimony of Dr. Clingan.)

Following the peremptory direction and advice of Dr. Clingan, Hurni went to Excelsior Springs,

a health resort in Missouri, and remained there during the greater part of June, July, and August, 1914. (Trans., pp. 26, 35.) Dr. Clingan had told him that he would break down if he did not get away from his business. (Trans., p. 26.) Dr. Clingan's testimony was not contradicted. While at Excelsior Springs, Hurni consulted a Dr. Bogart, and also a Dr. Prather, and during his stay at Excelsior Springs, Hurni was treated by Dr. Prather, receiving a number of serum treatments by hypodermic injections, the number being estimated by Hurni's wife at about thirty. (See testimony of Mrs. Hurni, Trans., commencing page 37.)

Dr. Gibson, local medical examiner of the Insurance Company, testified that in recommending Hurni as a fit applicant for insurance, he relied upon the truth of the answers to the questions which Hurni had made, as well as upon the physical findings resulting from the physical examination, and that he would not have recommended Hurni as a fit applicant for insurance, had be known or had cause to know that the answers Hurni made to the questions put to him were not in fact true. (See testimony of Dr. Gibson, commencing Trans., page 27, and Trans., commencing page 43.)

(2) *On the Issue of Incontestability.*

The facts on this, the sole issue in the case, were admitted in the pleadings or were stipulated to be as follows:

The policy contained the following provision:

> "INCONTESTABILITY.—This policy shall be incontestable except for non-payment of premiums provided two years shall have elapsed from its date of issue." (Trans., page 4.)

The original application of Rudolph Hurni, upon which the policy in suit was issued, was signed and dated September 2, 1915. At the top of the application there is written in ink: "Date policy August 23, 1915. Age 47." (Trans., page 4.)

The application contains the following provision:

> "The applicant, upon request, may have policy antedated for a period not to exceed six months." (Trans., page 4.)

The policy was thus antedated at the request of the applicant and to give him the benefit of a better premium rate. (Trans., page 53.)

The application was accepted and the policy sued on was executed by the signatures of the president and secretary and the countersignature of the registrar of the Insurance Company on the 7th day of September, 1915. (Trans., page 66.)

The policy was actually delivered to Rudolph Hurni on September 13, 1915. (Trans., page 67.)

Rudolph Hurni died on the 4th day of July, 1917. (Trans., pages 2, 10.)

The plaintiff furnished proofs of death on the 19th day of August, 1917. (Trans., pages 2, 10.)

On the 24th day of August, 1917, the General Solicitor of the Insurance Company, conceded to have had full power to act for the Company, wrote a letter to the plaintiff (which was received by the addressee on August 27, 1917) asserting that because the policy was procured by the fraud of Rudolph Hurni, the defendant denied liability. (Trans., page 67.)

On these undisputed facts, the Circuit Court of Appeals held:

1. That the policy sued on was obtained by fraud.

2. That the two-year period within which the Insurance Company could contest its liability on the policy commenced to run on August 23, 1915, although that date is prior to the date of the application for the policy or the true date of its execution or delivery.

3. That the two-year period within which the Insurance Company could contest its liability on the policy continued to run notwithstanding the death of Rudolph Hurni.

4. That the Insurance Company first "contested" liability on the policy on August 24, 1917, by the formal notice of its General Solicitor, and such denial of liability being thus given one day after its right to "contest" had expired under the court's interpretation of the "date of issue," the defense of fraud was unavailable.

5. That the sending of a letter to the Packing Company by the Insurance Company, in which payment of the policy was refused, was a sufficient act of "contest" within the meaning of the incontestability clause.

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that the two-year contestability period commenced to run on August 23, 1915, (the fictitious date mentioned in the *testimonium* clause), it, however, not being the true date either (1) of the application for the policy, or (2) of its execution by the defendant, or (3) its delivery to the insured.

2. It also erred in holding that, notwithstanding the insured died within the period during which the defendant is permitted under the terms of the policy to contest its liability, and notwithstanding that the rights of both insurer and insured are fixed as of the date of the death of said insured, nevertheless the two-year period of contestability continued to run from the death of the insured.

ARGUMENT.

I.

The Policy was void for fraud.

The question of fraud was litigated on the first trial and decided against the defendant. The

Circuit Court of Appeals, reviewing this decision of the trial court on a writ of error, held that there was fraud and reversed the trial court. When the case was remanded to the district court, after a writ of certiorari had been denied by the United States Supreme Court (251 U. S., 556), the existence of fraud in the procurement of the policy had become the law of the case, and was not further contested by the plaintiff. On the retrial substantially the same evidence as to Hurni's fraud was offered by the defendant and received by the trial court subject to the court's ruling on the question of law, then for the first time raised, to wit, whether the incontestability clause prevented such defense. No attempt was made by the plaintiff to preserve any right it may have had to litigate the question of fraud, nor did it raise the point that the decision by the Circuit Court of Appeals on the first submission on this question was erroneous.

On the second trial at the close of the entire case each party moved for a directed verdict and a verdict was directed for the plaintiff, not because there was no fraud shown but because the defendant could no longer urge fraud as a defense.

When both parties moved for a directed verdict each conceded that there was no disputed question of fact in the case and that there was open for decision merely a question of law, to wit, whether the defendant, in view of the incontestability clause, could urge Hurni's fraud as a defense to the claim on the policy.

It is well settled in the Federal courts that where both parties move for a directed verdict, and nothing else appears, the court must assume that each concedes there is no dispute with respect to the facts, and, where a finding of the fact is made by the trial court and there is evidence to support it, an appellate court will not review the correctness of such finding.

Williams vs. Vreeland, 250 U. S., 295, 297.
Sena vs. American Turquoise Co., 220 U. S., 497, 501.
Empire State Cattle Co. vs. Atchison, Topeka & Santa Fe Ry. Co., 210 U. S., 1, 8.
Beuttell vs. Magone, 157 U. S., 154, 157.

The rule is stated in *Williams vs. Vreeland, supra,* by Mr. Justice McReynolds, who said, page 298:

> "The established rule is, 'where both parties request a peremptory instruction and do nothing more they thereby assume the facts to be undisputed and, in effect, submit to the trial judge the determination of the inferences proper to be drawn therefrom.' And upon review, a finding of fact by the trial court under such circumstances must stand if the record disclosed substantial evidence to support it."

In the instant case, the fraud was not constructive but consisted in a deliberate and gross sup-

pression of essential facts and the statement of affirmative untruths.

II.

The two-year contestable period commenced to run either (1) on September 7, 1915, when the Policy was actually executed, or (2) on September 13, 1915, when it was delivered and took effect.

The clause in question reads as follows:

> "INCONTESTABILITY.—This policy shall be incontestable except for non-payment of premiums, *provided two years shall have elapsed from its date of issue.*"

As previously stated, the application for the policy was made September 2, 1915, and when subsequently the defendant decided to issue the policy, it was antedated to August 23, 1915, in order to give the applicant for insurance a more favorable age rating.

The *testimonium* clause of the policy was therefore made to read as follows:

> "In witness whereof, the company has caused this policy to be *executed* this 23rd day of August, 1915."

There was therefore a conceded difference between the nominal date of the policy and the actual date of issue. The former was fictitious; the latter

was a fact. The contract did not become effective or binding until its delivery to the insured. The application provides:

> "The proposed policy shall not take effect unless and until the first premium shall have been paid during my continuance in good health, and *unless also the policy shall have been delivered to and received by me during my continuance in good health.*"

The commencement of the running of the two-year contestability period is expressly stated as the *date of issue* of the policy. Thus the date of issue is specifically differentiated in the policy itself from the date of the policy.

What is the general meaning of the word "issue"? We quote from the dissenting opinion of Circuit Judge Sanborn:

> "Issue means 'to deliver for use.' A policy is not issued when it is dated and signed by the officers of the company, nor until it has been delivered to and accepted by the insured. The application for it is a request for a policy; the policy is a proposal of the company to insure on the terms specified therein; the receipt and acceptance of such a policy by the insured first closes the contract. Until that acceptance there may be negotiations, but no contract. Upon such receipt and acceptance on September 13, 1915, and not before, was there a contract in this case, and then, and not until then, was this policy issued. Then was it first 'de-

livered for use.' 4 Words and Phrases, First Series, p. 3780; *Jefferson Standard Life Ins. Co. vs. Wilson,* 260 Fed., 593; 171 C. C. A., 357; *Logsdon vs. Supreme Lodge of Fraternal Union of America,* 34 Wash., 666; 76 Pac., 292, 293; *Paine vs. Pacific Mutual Life Ins. Co.,* 51 Fed., 689, 693; 2 C. C. A., 459; *Equitable Life Assurance Co. vs. McElroy,* 83 Fed., 631, 642; 28 C. C. A., 365. The date of this policy, therefore, differed from the date of its issue. The former was August 23, 1915, and the latter was September 13, 1915."

See also:

Homestead Ins. Co. vs. Ison, 110 Va., 18, 23.
Maggett vs. Roberts, 112 N. C., 71.
Coleman vs. New England Life Ins. Co., 236 Mass., 552.
McMaster vs. New York Life Ins. Co., 183 U. S., 25.

To "issue" means "to put forth," "to emit," "to give effect to," "to deliver for use," "delivery." (Webster's Dictionary.)

Can it be reasonably doubted that the defendant intended to reserve to itself a full period of two years, within which it could discover any circumstances that would enable it to rescind or otherwise contest the contract on the ground of fraud?

When the parties to this contract of insurance were negotiating, they knew that the date which

was to be recited in the policy was to be a fictitious date and not the real date of execution. They also knew that the policy could not be "issued" on that fictitious date because it already had passed. The application was not made until September 2, 1915. The policy had to be executed at the Home Office of the Insurance Company in New York, and was so executed there on September 7, 1915. It then had to be forwarded to Sioux City, Iowa, for delivery, and it was forwarded and was delivered September 13, 1915. Then and only then it became a binding contract. Both parties had agreed that the policy should not be in force and its obligations and limitations would not begin until it was delivered and the first premium paid. It therefore was agreed that the nominal date of the policy should be anterior to the "date of issue." It never was agreed by the parties that such date of issue should be the same as a fictitious date of the policy. Such an agreement would have been impossible of fulfillment because obviously the policy could not be *issued* on August 23, 1915, that date being more than one week prior to the date it was applied for.

The parties could have agreed that the two-year contestability period should begin to run either

(1) from the fictitious date of the policy, or

(2) from the date when the policy was actually executed, or

(3) from the date when the policy was actually delivered.

In expressing their agreement they used the expression "date of issue" and themselves interpreted it by providing that the policy should not take effect unless "delivered" to the applicant. Manifestly, the policy was not "issued" until it was in force. Moreover, if the insured had refused to accept the policy when tendered, or had he refused to pay the first premium until say January 1, 1916, and the policy was then delivered, surely no one could say that the policy was issued four months before.

It must follow, therefore, that the policy was not "issued" until it was delivered or in any event until it was executed.

It is clear then, that the parties used the words "date of issue" to mean the date of delivery, *i. e.*, the date when the policy should become a binding contract or, at the earliest, the date when the Company actually executed it.

The incontestability clause, limiting as it does the right of the Insurance Company to contest its liability under the policy on the ground of fraud, is a self-imposed limitation of right, because ordinarily one always has the right to contest liability on the ground of fraud.

Being a self-imposed limitation, and for the benefit of the insurer, the clause should not be so construed as to inflict a greater limitation on the rights of the Insurance Company to defend itself against a fraud than clearly arises from the plain wording and meaning of the clause itself.

To so hold is to read out of the policy contract, by an arbitrary construction not justified by any ambiguity or inconsistency in it, the plain provision reserving to the defendant two years from the date it assumed a liability within which to contest liability.

We appreciate and concede the full force of the general rule of construction that the provisions of an insurance policy should be construed against the insurer. Were it necessary for the purposes of this case, it could be reasonably urged that the rule in question should not have the same application, or possibly any application, in cases of fraud which invalidates the contract altogether. In the view of the law, the contract, where fraud was practiced in its procurement, had no existence. Where a contract is valid, and a court is asked to enforce its provisions, there is reason for holding that, as the insurer dictates the terms of the contract, any fair doubt should be resolved in favor of the insured.

But does this rule apply with equal force, where the entire contract, including the incontestability provision, is void by reason of the fraud of the insured in procuring the contract?

Public policy does require that as the rights of the insured should be protected, the many provisions of an insurance policy should be in cases of doubt resolved against the insurer; but does public policy require that, where the defense to the policy

is that it is void on the ground of fraud, that a clause of the void contract, which limits the power to prove the fraud, should be construed against the insurer and in favor of the insured?

However, this case does not require a decision of this point; for, conceding *arguendo* that the incontestability provision must be construed as favorably to the insured as any other executory clause, this rule does not require an unreasonable construction, which would facilitate a fraud.

The real question is, what did the parties fairly intend by the language of their contract?

Such intention must not be nullified by a fanciful perversion of language. Words are, at best, uncertain vehicles of thought, and, in commercial contracts, few covenants can be phrased that cannot be tortured into absurd meanings. The rule in question does not mean that language shall be juggled with in order to compel the insurer to do something that it did not promise to do, or submit to a conceded fraud.

Having in mind the purpose of the contract and the particular provision which may require construction, the cardinal rule of interpretation is to give it a fair and reasonable interpretation. Where of two such constructions, one enables an unquestioned fraud to be perpetrated, and the other facilitates its detection, there should be less reason to give the insured a construction that enables him to defraud the insurer.

We submit that the fair and unmistakable intention of the parties was that, when the Company assumed responsibility, it should have *two full years* thereafter to determine whether the insured had practiced any fraud upon the insurer. To reduce this limitation by dating it from an anterior and fictitious date, not only reduces the two years which the parties manifestly had in mind, but it might altogether destroy such right of rescission.

This can be shown by a very possible illustration.

Suppose this clause had provided that the policy would only be contestable within six months from the date of issue, and suppose further that the policy had been dated back six months from the time of its actual execution.

In such a case, could it reasonably be contended that, when the parties agreed that the insurer should have six months to ascertain whether a fraud had been practiced upon it, that nevertheless the provision was valueless because the time had expired before the contract of insurance even began? Such a construction would wholly nullify the right of the insurer to protect itself against fraud.

In such a case, no court would hesitate to say ~~that~~ when a period of six months was given to contest the policy, that the provision meant what it said, and that if, leaving such clause in the policy, the policy was dated back six months before the contract of insurance was in fact made,

~~that~~ the six months' period commenced to run from the time that the minds of the parties met.

Such a case differs only in degree from the instant case; for, while the ruling of the court below did not altogether destroy the time which the insurer reserved for the detection of fraud, yet it has operated to cut it down, and thus to impair the reserved right of the defendant to protect itself from fraud. In this case it has operated to perpetrate a fraud on the insurer.

It is a fundamental rule of construction of a contract that all the words, terms and provisions thereof shall be given effect, if possible, and, to quote again from the dissenting opinion of Circuit Judge Sanborn:

> "Where a contract is susceptible of two constructions—one of which makes the different parts of it accordant and another which makes them discordant—the former should be preferred, because it cannot be assumed that the parties intended to insert inconsistent provisions. *Burdon Central Sugar Refining Co. vs. Payne,* 167 U. S., 127, 142; 17 Sup. Ct., 754; 42 L. Ed., 105; *Miller et al. vs. Hannibal & St. Joe R. Co.,* 90 N. Y., 430, 433; 43 Am. Rep., 179; *Barhydt vs. Ellis,* 45 N. Y., 107, 110."

Applying the above rule to the insurance contract here in question, we have a recital in the *testimonium* clause of a date known to the contracting parties to be fictitious, and we have in the incon-

testability clause a provision that the policy shall be incontestable after two years shall have elapsed from the date of issue. By construing the "date of issue" to mean either the date of actual execution, or the date of delivery, when the policy by its terms took effect, and not the fictitious date of execution, each expression is given its rational meaning and the provisions are accordant and harmonious.

III.

The death of the insured matured the policy and the rights of the parties thereto became fixed at such death and the incontestability clause could not become operative.

Where the insured dies before the period of contestability has expired, the Insurance Company is precluded from bringing an action to rescind for the reason that it has an adequate remedy at law, in that all the grounds for such rescission may be set up as a defense in an action at law brought to enforce the contract.

Cable vs. U. S. Life, 191 U. S., 288;
Insurance Co. vs. Bailey, 13 Wall., 616;
Griesa vs. Mutual Life Ins. Co., 169 Fed., 509;
Riggs vs. Union Life Ins. Co., 129 Fed., 207;
Jefferson Standard Life vs. McIntyre, 285 Fed., 570.

Jefferson Standard Life Ins. Company v. Smith, 248 S.W. 897, (Arkansas, 1923)
See Addendum, post p. 55.

If the rights of all parties became fixed by the death of the insured on July 4, 1917, the necessity of determining the date when the incontestability clause commenced to run, ceases, as the insured admittedly died before two years had expired, whether the period is measured from August 23d, 1915, the fictitious date of the policy, or from September 13th, 1915, the date of delivery of the policy.

There is a line of State authorities holding that such a clause is applicable notwithstanding the policy holder may die before the expiration of the contestability period. It is this rule of construction that we attack as erroneous. *We contend that under the clause in question, the insured must have lived until the expiration of the period in order to make the policy incontestable.*

The only federal court decision on this important question is the recent case of *Jefferson Standard Life vs. McIntyre,* 285 Fed., 570. In that case the District Court of the Southern District of Florida held that a similar clause "contemplates the continuance in life of the assured" during the period of limitation.

The rule that death of the insured stops the running of the contestability period is a necessary implication of the decisions of this court in *Cable vs. U. S. Life Ins. Co.,* 191 U. S., 288, and *Phoenix Ins. Co. vs. Bailey,* 13 Wall., 616, holding that after death the insurance company cannot bring a suit in equity to rescind for fraud for the reason that it has a plain, adequate and complete remedy at

law by setting up the fraud as a defense in the law action. This rule has been followed in *Griesa vs. Mutual Life Ins. Co.*, 169 Fed. Rep., 509, and *Riggs vs. Union Life Ins. Co.*, 129 Fed. Rep., 207.

See also Fed. Jud. Code, §§ 267 and 274*b*.

If the insurance company must wait until the action at law is commenced and assert its defense of fraud in that action and such remedy is plain, adequate and complete, the rule must rest upon the fact that the rights of both insurance company and beneficiary are fixed by the maturing of the policy through the death of the insured.

There is no doubt that in numerous cases, in both Federal and State Courts, the question was involved but passed over *sub silentio*. As examples of such cases the following may be mentioned as typical.

In *Aetna Life Ins. Co. vs. Moore*, 231 U. S., 543, the record of this case shows that the policy involved contained a one-year incontestability clause, and bore date July 15, 1905, and that the insured died May 27, 1906, *i. e.*, shortly before the end of the period of contestability. Suit was not commenced until May 25, 1907, and the insurance company's answer was not filed until November 30, 1908; so that there was no judicial contest by the company until long after the period of contestability had expired. A similar state of facts existed in *Prudential Ins. Co. vs. Moore*, 231 U. S., 560. An examination of the records in these cases dis-

closes no evidence of any extra-judicial "contest" before the one-year contestability period expired. It may therefore be properly assumed that in the said cases all parties assumed that the insurance company was not precluded from asserting its meritorious defense by reason of its failure to contest liability either in court or out of court before the expiration of one year from the date of the policy.

The incontestability clause cannot always be given a strictly literal construction in order to fix the date when the contestability period expires. Otherwise, it would often operate to terminate a litigation in the very midst of a trial. If the two-year period of contestability happened to expire while a trial was in progress, the plaintiff's counsel might rise and suggest to the court that two years having just expired, the policy was no longer contestable and that therefore the defendant's defenses were no longer available. But such a ~~put~~ theory would be a plain absurdity.

But a literal construction is precisely what the plaintiff in the case at bar is contending for. Such construction ignores the fundamental fact that in case of a life insurance policy, the death of the insured is the crucial and decisive fact determining the rights and duties of the contracting parties.

There are many cogent reasons why it may be said that it is the intention of the contracting parties to the contract of insurance that the insured must live two years in order to make the in-

contestability clause applicable. Against these there can be advanced no reason except that generally speaking, a policy will be construed, in case of an ambiguity, against the insurance company and in favor of the claimant. In the class of cases such as the instant case, there exists no reason for unreasonably applying this rule of construction against the party who has been the victim of fraud and deceit.

Here we have established as a matter of law and fact that this policy sued upon was obtained by fraud and that the alleged contract was wholly void, and we have, at the eleventh hour, a claim of incontestability asserted by the plaintiff, based upon a fictitious date. Such a claim is as lacking in merit as is the claim upon the void policy.

The main error in the decisions of some State courts, which hold the incontestability clause applicable notwithstanding the death of the insured during the contestability period, is in failing to differentiate between the policy of insurance, as such, and the obligation arising therefrom between the claimant and the insurance company after the death of the insured.

A contract of insurance necessarily imports, among other things, a so-called "risk." Where there is no risk, there can be no insurance. After the insured is dead, there is no longer any risk. What before was a hazard and an uncertainty has become a certainty. Upon the death of a person,

whose life is insured, the rights under the policy become fixed. The contract is no longer one of insurance, but of payment, if the policy is valid.

Risk and insurance are strictly correlative. Insurance can not exist without risk, and upon cessation of the risk, the insurance ceases to exist as such.

The fundamental effect on the insurance contract of the happening of the event insured against is well illustrated by the manner in which the courts have treated provisions in fire insurance policies prohibiting assignment without the consent of the insurance company.

In *Mellen vs. Hamilton Fire Ins. Co.*, 17 N. Y., 609, the Court of Appeals in considering a clause in a fire insurance policy prohibiting an assignment without the consent in writing of the insurance company, said (p. 615):

> "The restrictive clause in the policy, upon which the objection is founded, refers only to an assignment of the policy during the *pendency of the risks* and accompanying the transfer of an interest in the property insured, and, thus interpreted, there are evident reasons for its introduction; but where the assignment is made, as in the case before us, *when the risks have ended,* and for the sole purpose of enabling the assignee to recover a loss, it is in reality no more than an assignment of a debt, which, as the company has no motive of interest for preventing, it would be unreasonable to suppose was meant to be prohibited." (Italics ours.)

It will be seen that the court clearly recognizes the essential difference which exists between an insurance policy during the pendency of the risk and the liability or cause of action arising under the policy upon the termination of the risk.

When an insurance company enters into a contract of insurance with a policyholder, it thereby undertakes the risk of insuring his life. It undertakes to pay the sum named in the policy to the beneficiary upon the contingency of death, provided the policy is then in force. Such is the general character of the contract in its inception.

By the incontestability clause the Insurance Company undertakes that, provided it continues to insure against the risk for a period of two years after the policy is issued, thereafter it will make no defense against a claim under the policy. It is therefore obvious that the risk must continue for the period of two years. If the risk does not continue in force for two years then the incontestability clause never can become applicable.

To state the proposition another way:

The insurance company limits its right to cancel or rescind the policy for any reason whatsoever, except for the non-payment of premiums, to a period of two years, provided the policy exists as a policy of insurance for that time. After two years have elapsed from the date of issue, the policy cannot be rescinded except for the non-payment of premiums; and in the event of the death of the insured

after two years, the obligation to pay becomes absolute.

It is obvious that the Insurance Company intended to reserve to itself the privilege of investigation to determine whether or not it desired to continue the risk. The period of time during which it might investigate, is limited to two years.

If the insured dies before the two year period of contestability (and incidentally the period wherein investigation could be made), the Insurance Company would not be able to make as full and complete an investigation as if the insured were alive and able perhaps to answer questions or be under observation. Moreover the Company can neither begin suit or give notice of rescission until legal representatives are appointed for the deceased insured. Time thus elapses. Therefore, to hold the incontestability clause as continuing to run is certainly to deprive the Insurance Company of a right; a right which the Insurance Company by its own act had limited in its operation, because without the limitation, the Insurance Company could at all times contest a policy for fraud in the inception of it.

It seems manifestly unjust and inequitable, that where the Insurance Company has so limited its right of cancellation and rescission, that it should be put to a further limitation of its rights in the premises, by depriving it of possibly the most important avenue of investigation that might be open to it, viz.; the opportunity of further examining

and interrogating the insured or observing his conduct.

We submit the foregoing as illustrative of the error in the decisions which declare a contrary rule. There never was a contract *with the beneficiary* that the policy should ever be incontestable. There was a contract *with the insured* that the policy should be incontestable provided the contract relationship between the insured and the Insurance Company continued during the lifetime of the insured for the period of two years.

Our construction of the contract is much more reasonable and just, than the construction which holds that the incontestability clause is effective notwithstanding that the insured dies within the two-year period.

IV.

Notice by the Insurance Company denying liability on the policy was a "contest" and prevents the assertion of an estoppel under the incontestability clause.

The court below (all three judges concurring) correctly held that the letter of August 24, 1917, written by Frederick L. Allen, the General Solicitor of the Insurance Company, to the plaintiff Company was a sufficient act of "contest." The only possible interpretation of this letter is that the Insurance Company contested the right of the Packing Company to demand payment under the policy. That is sufficient. To contest a policy means to

repudiate it, to claim that it is unenforcible, to deny that it is a binding contract. *Mutual Life Ins. Co. vs. Hurni Packing Co.,* 280 Fed., 18; *Jefferson Standard Life vs. McIntyre,* 285 Fed., 570.

The authorities holding that a repudiation of an executory contract by one of the contracting parties gives to the other party a right to sue immediately for a breach on the theory that the contract is at an end for all purposes except to enable the aggrieved party to recover his damages are in principle analogous and should be controlling.

It is certainly unreasonable to hold that the language of the incontestability clause required the Insurance Company to contest by a court proceeding. The clause says nothing about a contest, judicial or otherwise. It simply destroys a possible defense to the claim of the insured. The limitation refers to available defenses, not to actions or denials of liability. We do not understand that the sufficiency of the contest is longer disputed.

If, however, the letter of the General Solicitor of the Insurance Company, denying liability under the policy to the Packing Company, was not a sufficient contest, the fact that the action at law to recover on the policy was commenced on August 28, 1917, and within two years after the date of issue, as hereinbefore interpreted, and the timely filing of the defendant's answer on December 13, 1917, together constitute a contest within the period of limitation. After an action at law has been

started it is held generally by the courts that no action in equity will lie to cancel the policy because the Insurance Company has a complete and adequate remedy at law, in that it may set up in such action at law all of the facts upon which it relies for a cancellation of the policy in the equity suit. It follows, therefore, that on and after August 28, 1917, the Insurance Company was precluded from invoking the jurisdiction of a court of equity to cancel the policy and was compelled to defend the action at law and could take no other or different means of contesting the policy. When, therefore, the defendant filed its answer on December 13, 1917, it seasonably contested its liability on the policy. It would be unreasonable to require the Insurance Company to file its answer on or before September 13, 1917, when the rules of practice of the court did not require it to do so.

V.

Conclusion.

The questions hereinbefore discussed are important and at least one of them is novel in the Federal Courts. Similar clauses are to be found in millions of policies of life insurance, and similar questions to those in the instant case are frequently arising. Furthermore, there is a conflict of decision between the Federal courts of the Fifth Circuit and the Eighth Circuit on the questions (1) whether the running of the incontestability period

began at the date of the policy or the date of delivery, and (2) whether the death of the insured during the incontestability period fixed the rights of the parties and rendered the incontestability clause inoperative. (See, on the first question, *Mutual Life Ins. Co. of N. Y. vs. Hurni Packing Co.,* 280 Fed., 18, and *Jefferson Standard Life vs. Wilson,* 260 Fed., 593; and on the second question, *Mutual Life Ins. Co. of N. Y. vs. Hurni Packing Co.,* 280 Fed., 18, and *Jefferson Standard Life vs. McIntyre,* 285 Fed., 570.)

We respectfully submit that justice requires that the appellant's contentions as to all those questions should be sustained. Public policy requires that the door should be closed, not further opened, to the too prevalent frauds upon life insurance companies. These incontestability clauses, if loosely construed, are an incentive to men to make false representations on the gamble that their falsity will not be discovered within the short period of limitation.

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Addendum.

Since this brief was prepared and printed there was published a decision of the Supreme Court of Arkansas in the case of *Jefferson Standard Life Ins. Co. vs. Smith,* 248 S. W., 897, which was handed down on March 12, 1923. This case is a direct authority in favor of the proposition which we have urged in Point III of the brief.

In this case the insurance company, on April 15, 1920, issued to Smith, as beneficiary, a policy on the life of his wife. The policy contained this clause:

> "After this policy shall be in force for one full year from the date hereof it shall be incontestable for any cause except for nonpayment of premiums."

The insured died March 5, 1921, and on April 13, 1921, two days before the contestability period expired, the company brought suit to cancel the policy for fraud. On June 30, 1921, a suit at law was started to recover on the policy.

The chancery court transferred the equity suit and it was then consolidated with the suit at law. On the trial judgment was directed in favor of the beneficiary on the ground that a year had expired before the suit at law was brought on the policy. In reversing the judgment the court says:

> (1) "Instead of transferring the suit to cancel the policy to the circuit court, that suit should have been dismissed, for the rea-

son that the death of the insured fixed the rights and liabilities of both the insurer and the insured * * * ."

(2) "But inasmuch as the insured died before the year had expired, the incontestable clause did not apply, and the fact that the suit was not brought until after the first anniversary of the policy is unimportant, for, as we have said, the rights and liabilities of the parties under the insurance contract had been fixed by the death of the insured."

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SUBJECT INDEX.

TABLE OF CASES.

No. 454.

Supreme Court of the United States.

OCTOBER TERM, 1923.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER,

VS.

HURNI PACKING COMPANY, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Nature of Action.

This action was brought by the Hurni Packing Company, hereinafter designated Packing Company, as beneficiary in a policy of life insurance for the sum of $25,000 issued by the Mutual Life Insurance Company of New York, hereinafter designated Insurance Company, upon the life of Rudolph Hurni.

The Issues.

The respondent brought this action at law in the District Court of Woodbury County, Iowa, alleging that

it was a corporation organized under the laws of the State of Iowa; that the Insurance Company was a corporation organized under the laws of the State of New York, and engaged in the life insurance business; that a policy was issued and delivered on or about the 23rd day of August 1915, insuring the life of Rudolph Hurni for the sum of $25,000; that he died on July 4, 1917, the policy then being in full force; that on or about the 19th day of August, 1917, the Insurance Company was furnished with due proofs of death, and that notwithstanding these facts the Insurance Company refused to pay the amount due under the policy. The Packing Company therefore asked judgment for $25,000 with interest from August 19, 1917, and costs. A copy of the policy was attached to the petition, the material parts of which are as follows:

"THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, in consideration of the annual premium of one thousand and sixty nine and 75/100 dollars, the receipt of which is hereby acknowledged, and of the payment of a like amount upon each 23rd day of August hereafter until the death of the insured, promises to pay upon receipt of due proof of the death of Rudolph Hurni * * * the amount of twenty five thousand dollars, * * * to Hurni Packing Company of Sioux City, Iowa. * * *

"All premiums are payable in advance at said home office, or to any agent of the company upon delivery on or before the date due of the receipt signed by the president * * * and countersigned by said agent. * * *

"SUICIDE. The company shall not be liable hereunder in the event of the insured's death by his own act, whether sane or insane, during the period of one year after the date of issue of this policy, as set forth in the provisions of the application endorsed hereon, or attached hereto.

"INCONTESTABILITY. This policy shall be incontestable except for non-payment of premiums provided two years shall have elapsed from its date of issue.

"IN WITNESS WHEREOF the company has caused this policy to be executed this 23rd day of August, 1915" (Trans. pp. 1-6, 71-73).

The application, which is expressly made a part of the policy, contains the following:

"Application of Rudolph Hurni for insurance.

"Date of policy August 23, 1915; Age 47. This application is made to the Mutual Life Insurance Company of New York.

"I agree that any policy the company may issue upon this application shall contain the following clause:

" 'If the insured shall engage in such military or naval service * * * within the first policy year, and shall die within one year of the date of the beginning of such service * * * the company's liability hereunder shall be limited to one-fifth of the face of the policy.'

"During the period of one year following the date of issue of the policy, for which application is made, I will not engage in any of the following extra hazardous occupations * * *. It is understood and agreed that the risk of death will not be covered by the policy if

such death occurs by my own act, whether sane or insane during the period of one year next following the date of issue."

Application was made by the Insurance Company for an order of removal of the cause to the Federal Court, and upon removal the Insurance Company filed its answer alleging in substance that the policy was obtained by Rudolph Hurni through fraud and misrepresentations, and alleged further as follows:

"That defendant has heretofore made in writing a legal offer and tender to return the premiums paid to it in accordance with the terms and conditions of said policy, together with legal interest thereon, which said offer and tender the plaintiff refused, and still refuses to accept. That defendant is at all times willing, able and ready to repay to plaintiff, or to whomsoever may be entitled thereto, the amount of the premiums paid to it, together with interest in accordance with its written offer, and will ever be ready, able and willing to so repay said premiums, and interest" (Trans. pp. 11, 13, 15).

The prayer of the answer is as follows:

"Wherefore defendant prays that the policy sued on be declared null and void, and of no force and validity, and that plaintiff's petition be dismissed at its costs, and prays judgment for the costs incurred by the defendant" (Trans. pp. 11, 13, 15).

The Packing Company filed its reply admitting that tender had been made, but denying the allegations relating to fraud and misrepresentations, and alleging that the Insurance Company was estopped from claiming that

the insured was not in good health at the time the policy was issued, such estoppel being based upon the fact that the insured had been examined by the medical examiner of the Insurance Company, and declared to be a fit subject for insurance (Trans. pp. 15, 16).

Prior to the second trial in the United States District Court the Packing Company filed the following amendment to its reply:

"Comes now the plaintiff, leave of court first having been granted, and amends its reply as follows:

"The plaintiff states that the defendant failed to contest the policy of life insurance, payable to the plaintiff by the tender of the return of the premiums paid or otherwise, within the two year period in which the policy might be contested, as provided by the terms thereof, and it is now barred from setting up or urging any of the defenses set forth in its answer" (Trans. pp. 17).

Statement of Facts in Chronological Order.

August 23, 1915: Date of policy, which recites "Mutual Life Insurance Company of New York, in consideration of the annual premium of one thousand and sixty-nine and 75/100 dollars, the receipt of which is hereby acknowledged, and of the payment of a like amount upon each 23rd day of August hereafter, until the death of the insured, promises to pay * * * twenty-five thousand dollars * * * to R. Hurni Packing Company, * * *

IN WITNESS WHEREOF *the Company has*

caused this policy to be executed this 23rd day of August, 1915."

September 2, 1915: Date of application for insurance which recitess "Date of policy, August 23, 1915. Age 47" (Trans. pp. 4, 71).

September 3, 1915: Date of medical examiners report (Trans. pp. 4, 8, 71, 77).

September 7, 1915: Policy executed by officers of Insurance Company (Trans. p. 66).

July 4, 1917: Rudolph Hurni died (Trans. p. 21).

August 19, 1917: Insurance Company furnished with proofs of death (Trans. pp. 2, 10).

August 24, 1917: Date of letter from Insurance Company refusing payment of policy (Trans. p. 70).

August 27, 1917: Letter of August 24, received by Hurni Packing Company, in which Insurance Company refused to pay policy (Trans. pp. 67, 70).

August 28, 1917: Action commenced on policy by service of notice upon the Commissioner of Insurance (Trans. p. 9).

September 11, 1917: Petition of Hurni Packing Company filed in District Court, Woodbury County, Iowa (Trans. p. 8).

November 5, 1917: Date of order of removal from said court to United States District Court (Trans. p. 9).

November 12, 1917: Defendant made written tender to the Packing Company of the two premiums paid in the sum of $2150.00, with interest at 6 per cent from the date of payments to the date of tender (Trans. p. 54).

December 3, 1917: Removal transcript filed in the office of the clerk of the United States District Court (Trans. p. 1).

December 13, 1917: Insurance Company filed its answer alleging fraud and misrepresentation on the part of Rudolph Hurni in obtaining the policy (Trans. p. 10).

Previous Trials and Determinations of Cause.

The first trial of the cause in the United States District Court resulted in a directed verdict for the Packing Company. The Insurance Company took a writ of error to the Circuit Court of Appeals, where the trial court was reversed, and a new trial ordered, the Circuit Court holding that "the answer (to certain questions) having been untrue and the matter material, and the maker of the statement necessarily knowing that it was untrue when he made it, the intention to deceive the insurer is necessarily implied as the natural consequence of such act. * * * On the evidence as presented, the court should have directed a verdict for the defendant" (260 Fed. 641). An attempt was made to obtain from this court a writ of certiorari to the Circuit Court of Appeals, the Insurance Company *resisting upon the ground that no final judgment had been entered below.* This court in denying the writ may have done so on that ground.

After the case was remanded for new trial the Packing Company filed the amendment to its reply as above stated, thus for the first time meeting the Insur-

ance Company's defense of fraud by alleging that it was barred from doing so, because it had not "contested" the policy on that ground within the two year contestable period provided for. In this trial additional evidence was introduced by the Packing Company to show that there was no intention on the part of Mr. Hurni to defraud the Insurance Company. At the close of the testimony, counsel for the Packing Company made the following motion:

"Now at this time to-wit, at the close of the taking of all of the testimony in the cause, plaintiff moves the court to direct a verdict in favor of the plaintiff for the amount sought to be recovered, on the ground that the evidence and the record in the cause, shows without dispute that the defendant did not within the two-year contestable period, take any affirmative action to cancel the policy or take any action whatsoever to cancel or annul the same, and in fact failed to tender back the premium until the 12th of November, 1917, or to take any other steps whatsoever for the purpose of contesting, cancelling or rescinding the policy of insurance upon which this action is brought, on any of the grounds set up as a defense, as required by the following provision of the policy, to-wit: 'This policy shall be incontestable, except for non-payment of premiums, provided two years shall have elapsed from the date of its issue.' "

The trial court in ruling upon that motion stated as follows:

"I have reached the conclusion that the plaintiff is entitled to recover from the defendant the amount of

this policy which is something like $25,000.00, and I want counsel to compute the amount of the verdict * * * It is the opinion of the court that upon the facts as disclosed by the testimony in this case, and the proceedings of the parties * * * the plaintiff is entitled to recover, and it will be your duty to return your verdict accordingly."

The Insurance Company again took the cause on writ of error to the Circuit Court of Appeals, and that court affirmed the judgment of the trial court (280 Fed. 18), and the cause is now in this court on certiorari brought by the Insurance Company.

ERRORS RELIED UPON BY PETITIONER RESTATED.

Counsel for the petitioner, as grounds for review, have assigned certain alleged errors on the part of the Circuit Court of Appeals. The errors assigned are in substance as follows:

Par. 1. The Circuit Court of Appeals erred in holding that the two year "contestable" period commenced to run on August 23, 1915, the date mentioned in the policy as the date on which it was executed.

Par. 2. That it erred in placing the construction upon the policy which limited the right of the Insurance Company to contest it to a period of "less than two years from its date of issue."

Par. 3. That it erred in holding that, notwithstanding the fact that the insured died within the contestable period, the period continues to run, "and unless the Insurance Company contests the liability before the expiration of said period, regardless of the death of the insured, the right to do so is gone."

Counsel for the respondent insist that the trial court, and the Circuit Court of Appeals, have both placed the proper construction upon the provisions of the insurance contract for the following reasons:

BRIEF.

I.

"A provision in a contract of insurance limiting the time in which the insurer may take advantage of certain facts that might otherwise constitute a good defense to its liability on such contract, precludes every defense to the policy other than the defenses excepted in the provision itself, including false answers in the application, and even fraud where the time fixed by the contract is not unreasonably short."

14 R. C. L. 1200.

Mutual Res. Fund Life Ass'n v. *Austin*, (C. C. A.) 142 Fed. 398, 6 L. N. S. 1064.

Arnold v. *Equitable Life Ins. Co.*, 228 Fed. 157.

Great Western Life Ins. Co. v. *Snavely*, (C. C. A.) 206 Fed. 20, 46 L. N. S. 1056.

Wright v. *Mutual B. Life Ins. Co.*, 118 N. Y. 237, 6 L. R. A. 731.

Bates v. *United Life Ins. Co.*, 68 Hun. (N. Y.) 144, 22 N. Y. Supp. 626, affirmed in 37 N. E. 824.

Teeter v. *United States Life Ins. Co.*, 159 N. Y. 411, 54 N. E. 72.

Metropolitan Life Ins. Co. v. *Peeler*, (Okla.) 176 Pac. 939, 6 A. L. R. 441, 447.

Dibble v. *Reliance L. Ins. Co.*, 170 Cal. 199, 149 Pac. 171.

Prudential Life Ins. Co. v. *Lear*, 31 App. D. C. 184.

Mass. Benefit Life Ins. Co. v. *Robinson*, (Ga) 42 L. R. A. 261, 30 S. E. 918.

Weil v. *Federal Life Ins. Co.*, 264 Ill. 425, 106 N. E. 246, Ann. Cas. 1915 D. 974.
Royal Circle v. *Acterrath*, 204 Ill. 549, 68 N. E. 492, 63 L. R. A. 452.
Murray v. *State Mut. Ins. Co.*, (R. I.), 48 Atl. 800, 53 L. R. A. 742.
Clement v. *New York Life Ins. Co.*, (Tenn.) 46 S. W. 561, 42 L. R. A. 247.
Am. Nat'l Ins. Co. v. *Briggs*, (Tex. Civ. App.) 156 S. W. 909.
Welch v. *Union Cent. Life Ins. Co.*, 108 Iowa 224, 230.
Citizens Life Ins. Co. v. *McClure*, 127 S. W. 749, 27 L. N. S. 1026, 138 Ky. 138.
Mutual Life Ins. Co. v. *Buford*, (Okla.) 160 Pac. 928.
Flanagan v. *Federal Life Ins. Co.*, 231 Ill. 399, 83 N. E. 178.
Indiana Life Ins. Co. v. *McGinnis*, 180 Ind. 9, 45 L. N. S. 192, 101 N. E. 289.
Commercial Life Ins. Co. v. *McGinnis*, 50 Ind. A. 630, 97 N. E. 1018.
Mutual Life Ins. Co. v. *New*, 125 La. 41, 51 So. 61, 27 L. N. S. 431.
Reagan v. *Union Mut. Life Ins. Co.*, 189 Mass. 555, 2 L. N. S. 821, 76 N. E. 217.
Drews v. *Metropolitan Life Ins. Co.*, 79 N. J. L. 398, 75 Atl. 167.

The incontestable clause is in reality a waiver, for a consideration, of the right to make defense, and not a limitation.

Metropolitan Life Ins. Co. v. *Peeler*, (Okla.) 176 Pac. 939, 6 A. L. R. 441.
Clement v. *New York Life Ins. Co.*, (Tenn.) 46 S. W. 561, 42 L. R. A. 247, 249.
Commercial Life Ins. Co. v. *McGinnis*, 50 Ind. A. 630, 97 N. E. 1018, 1019.

The clause is adopted by insurance companies for the purpose of allaying the apprehensions of the insured, and thus enabling the companies to increase their business.

Mutual Res. Fund Life Ass'n. v. *Austin,* (C. C. A.) 140 Fed. 398, 6 L. N. S. 1064.
American Trust Co. v. *Life Ins. Co.,* 173 N. Car. 558, 92 S. E. 706.
Duvall v. *National Life Ins. Co.,* 28 Idaho 356, 154 Pac. 632, L. R. A. 1917 E. 333.
Mutual Life Ins. Co. v. *New,* 125 La. 41, 51 So. 61, 27 L. N. S. 431, 434.

"The object of the clause is plain and laudable—to create an absolute assurance of the benefit, as free as may be from any dispute of fact except the fact of death, and as soon as it reasonably can be done."

Mutual Life Ins. Co. v. *Johnson,* 254 U. S. 96, 65 L. Ed. 155.

Even though fraud be shown in the inception of the policy, neither the policy nor the incontestable clause is void *ab initio.*

Carpenter v. *Providence Ins. Co.,* 16 Pet. 495, 509; 10 L. Ed. 1044, 1050.
Mutual Res. Fund Life Ass'n. v. *Austin,* (C. C. A.), 142 Fed. 398, 6 L. N. S. 1064.
Mohr v. *Prudential Life etc. Co.,* 32 R. I. 177, 78 Atl. 554.
Commercial Ins. Co. v. *McGinnis,* 50 Ind. A. 630, 97 N. E. 1018.
Drews v. *Ins. Co.,* 79 N. J. L. 398, 75 Atl. 167, 168.
New York Life Ins. Co. v. *Baker,* (C. C. A.), 83 Fed. 647, 27 C. C. A. 658.

II.

The contestable period is to be computed from the date the policy bears, not from the day of delivery, and the stipulated two year period ends two years from the former date.

14 R. C. L. 1201, 1233.

Mass. Benefit Life Ins. Co. v. *Robinson,* (Ga.), 42 L. R. A. 261, 30 S. E. 918.

Anderson v. *Mutual Life Ins. Co.,* 164 Cal. 712, 130 Pac. 726.

Harrington v. *Mutual Life Ins. Co.,* 21 N. D. 447, 131 N. W. 246, 34 L. N. S. 373.

Meridian Life Ins. Co. v. *Milam,* 172 Ky. 75, 188 S. W. 879, L. R. A. 1917 B. 103.

Monahan v. *Fidelity Mut. Life Ins. Co.,* 242 Ill. 488, 90 N. E. 213, 214.

Wood v. *American Yeoman,* 148 Iowa 400, 404.

The authorities hold that "its date of issue" means the date of execution as stated in the instrument.

Commercial Mutual Marine Co. v. *Union Mut. Ins. Co.,* 19 How. 319, 15 L. Ed. 636, 638.

Wright v. *East Riverside Irrigation Dist.,* (C. C. A.) 138 Fed. 313.

State v. *Blease,* 95 S. C. 403, 79 S. E. 247.

Yessler v. *Seattle,* 1 Wash. 308, 25 Pac. 1014.

Starr v. *New York Mut. Life Ins. Co.,* 41 Wash. 228, 83 Pac. 116.

Turner v. *Roseberry,* (Idaho) 198 Pac. 465.

Gage v. *McCord,* (Ariz.) 51 Pac. 977, 979.

Union Ins. Co. v. *American Fire Ins. Co.,* (Cal.) 40 Pac. 431, 28 L. R. A. 692, 693.

American Bridge Co. v. *Wheeler,* 35 Wash. 40, 76 Pac. 534.

Wood v. *American Yeoman,* 148 Iowa 400.

"Its date of issue" does not mean the date of the delivery.

Kansas Mutual Life Ins. Co. v. *Coalson,* 22 Tex. Civ. App. 64, 54 S. W. 388, 392.
Stringham v. *Mutual Life Ins. Co. of N. Y.,* 44 Ore. 447, 75 Pac. 822, 825.
Hubbard v. *The Hartford Fire Ins. Co.,* 33 Iowa 325, 329.

If there is any doubt as to the meaning of the words "its date of issue" under these rules they should be construed to mean the date of the instrument rather than the date of the application, or date of delivery.

III.

"One of the rules to be observed in the interpretation of contracts of this class is that they are to be liberally construed in favor of the insured and all doubts or ambiguities resolved against the one who prepared the contract."

McMaster v. *New York Life Ins. Co.,* 78 Fed. 33.
Shearer v. *Manhattan Life Ins. Co.,* 16 Fed. 720.
Mer Rouge State Bank v. *Ins. Co.,* (C. C. A.), 270 Fed. 567, 569.
Arnold v. *Ins. Co.,* 228 Fed. 157, 161.
First National Bank v. *Hartford Co.,* 95 U. S. 673, 24 L. Ed. 563.
Thompson v. *Phoenix Ins. Co.,* 136 U. S. 287, 34 L. Ed. 408.
Kelly v. *Mutual Life Ins. Co.,* 109 Fed. 56, 58.
Mareck v. *Mutual Reserve Ass'n.,* 62 Minn. 39, 64 N. W. 68, 69.

First National Bank v. *Hartford Fire Ins. Co.*, 95 U. S. 673, 24 L. Ed. 563, 565.
Kascoutas v. *Federal Life Ins. Co.*, 189 Ia. 889, 179 N. W. 133.
Jones v. *Continental Casualty Co.*, 189 Ia. 678, 179 N. W. 203.
Boatwright v. *American Life Ins. Co.*, 191 Ia. 253, 180 N. W. 321.
Vol. 5 Joyce on Insurance, p. 6112.
Goodwin v. *Provident etc. Ass'n.*, 97 Iowa, 226.
Drews v. *Ins. Co.*, 79 N. J. L. 398, 75 Atl. 167, 168.
Royal Circle v. *Achterrath*, 204 Ill. 549, 68 N. E. 492, 63 L. R. A. 452.
Mutual Life Ins. Co. v. *New*, 125 La. 41, 51 So. 61, 27 L. N. S. 431.
McKendree v. *Ins. Co.*, (S. Car.) 99 S. E. 806.
Woodmen of the World v. *Gilliland*, (Okla.) 67 Pac. 485.

If the construction of language in an insurance policy is doubtful, the words, being those of the insurer, are to be taken most strongly against the company, and most favorably to the insured.

Grace v. *American Cent. Ins. Co.*, 109 U. S. 278, 27 L. Ed. 932, 934.
Travelers Ins. Co. v. *McConkey*, 127 U. S. 661, 32 L. Ed. 308.
Mouler v. *American Life Ins. Co.*, 111 U. S. 335, 28 L. Ed. 447.
Burkheiser v. *Mutual Acci. Ass'n.*, 61 Fed. 816, 26 L. R. A. 112.
Liverpool & L. G. Ins. Co. v. *McNeill*, 32 C. C. A. 180, 89 Fed. 131.
Canton Ins. Co. v. *Woodside*, 33 C. C. A. 68, 90 Fed. 301.

Imperial Fire Ins. Co. v. *Coos County,* 151 U S. 452, 38 L. Ed. 231.
McMasters v. *New York Life Ins. Co.,* 40 C. C. A. 141, 99 Fed. 856.
Thompson v. *Phenix Ins. Co.,* 136 U. S. 287, 34 L. Ed. 408.

The courts will not give a construction to an insurance policy which will make it deceptive and calculated to mislead the well informed and impeach the good faith and fair dealing of the company, but will give it a liberal interpretation in favor of the insured.

Phenix Ins. Co. v. *Slaughter,* 12 Wall. 404, 20 L. Ed. 444.

"The rule is that if policies of insurance contain inconsistent provisions or are so framed as to be fairly open to construction, that view will be adopted, if possible, which will sustain, rather than forfeit, the contract."

McMaster v. *N. Y. Life Ins. Co.,* 183 U. S. 25, 42; 46 L. Ed. 64, 73.
Thompson v. *Phenix Ins. Co.,* 136 U. S. 287, 34 L. Ed. 408.

IV.

The death of the insured within the contestable period does not arrest the running of the so-called short statute of limitations adopted by the parties. The insurer must nevertheless take some "affirmative action," either by bringing suit, or by making defense to a suit, within the stipulated time.

Black v. *Ross,* 110 Iowa 112, 113.
Malone v. *Averill,* 166 Iowa 78, 83.

Ackerman v. *Hilpert,* 108 Iowa 247.
New York Life Ins. Co. v. *Baker,* 83 Fed. 647, 27 C. C. A. 658.
Wright v. *Mutual Benefit Life Ass'n.,* 118 N. Y. 237, 6 L. R. A. 731, 733.
Ebner v. *Ohio State Life Ins. Co.,* 69 Ind. A. 32, 121 N. E. 315, 317.
Prudential Life Ins. Co. v. *Lear,* 31 App. D. C. 184.
Jefferson Standard Ins. Co. v. *Wilson,* (C. C. A.) 260 Fed. 593.
American Trust Co. v. *Life Ins. Co.,* 173 N. Car. 558, 92 S. E. 706.
Hardy v. *Phenix Mutual Life Ins. Co.,* 180 N. C. 180, 104 S. E. 166.
Monahan v. *Metropolitan L. Ins. Co.,* 283 Ill. 136, 119 N. E. 68, L. R. A. 1918 D. 1196.
Plotner v. *Northwestern Nat'l. L. Ins. Co.,* (N. D.), 183 N. W. 1000, 1004.
Ramsay v. *Old Colony L. Ins.,* 297 Ill. 592, 131 N. E. 108, 110.

V.

An insurer seeking to contest a policy on the ground of fraud must act with diligence upon discovering the fraud.

Ramsay v. *Old Colony Life Ins. Co.* 297 Ill. 592, 131 N. E. 108, 109.
Clement v. *New York Life Ins. Co.,* (Tenn.) 46 S. W. 561, 42 L. R. A. 247, 249.
Commercial Life Ins. Co. v. *McGinnis,* 50 Ind. A, 630, 97 N. E. 1018, 1019.

The insurance company must "contest" the policy by taking some affirmative action, either by making defense to an action brought to recover on the policy, or

by an action brought by it to cancel or rescind the contract.

Monahan v. *Metropolitan Life Ins. Co.,* 283 Ill. 136, 119 N. E. 68, L. R. A. 1918 D. 1196 note.

Jefferson Standard Life Ins. Co. v. *Wilson,* (C. C. A.), 260 Fed. 593.

Black on Rescission and Cancellation, Vol. 2, p. 1155.

Ebner v. *Ohio State Life Ins. Co.,* 69 Ind. A. 32, 121 N. E. 315, 317.

Mass. Benefit Life Ins. Co. v. *Robinson,* (Ga.) 30 S. E. 918, 42 L. R. A. 261.

Indiana National Life Ins. Co. v. *McGinnis,* 180 Ind. 9, 101 N. E. 289, 45 L. N. S. 192. 196.

Commercial Life Ins. Co. v. *McGinnis,* 50 Ind. A. 630, 97 N. E. 1018, 1019.

Wright v. *Mutual Ben. Life Ins. Co.,* 43 Hun. 61 (Quoted in *Mass. B. Life Ass'n.* v. *Robinson,* (Ga.) 42 L. R. A. 261, 269).

Duvall v. *National Life Ins. Co.,* 28 Idaho 356, 154 Pac. 632, L. R. A. 1917 E. 333, 339.

American Trust Co. v. *Life Ins. Co.,* 173 N. Car. 558, 92 S. E. 706.

Murray v. *State Mutual Life Ins. Co.,* (R. I.) 48 Atl. 800, 53 L. R. A. 742, 743.

Mutual Life Ins. Co. v. *Buford,* (Okla.) 160 Pac. 928.

Moran v. *Moran,* 144 Iowa 451.

Ramsay v. *Old Colony Life Ins. Co.,* 297 Ill. 592, 131 N. E. 108.

Reagan v. *Union Mutual Life Ins. Co.,* 189 Mass. 555, 76 N. E. 217, 2 L. N. S. 821.

Teeter v. *United, etc, Ins. Ass'n.,* 159 N. Y. 411, 54 N. E. 72.

An insurance company is not entitled to claim that the death of the insured within the contestable period stops the running of that period, in the absence of a showing of "special circumstances" which would prevent it from contesting its liability on the policy in an action at law.

Jefferson Standard Life Ins. Co. v. *Wilson,* (C. C. A.) 260 Fed. 593.

Greisa v. *Mutual Life Ins. Co.,* (C. C. A.) 169 Fed. 509, 513.

Riggs v. *Union Life Ins. Co.,* (C. C. A.) 129 Fed. 207.

Cable v. *United States Life Ins. Co.,* 191 U. S. 288, 48 L. Ed. 188.

Monahan v. *Metropolitan Life Ins. Co.,* 283 Ill. 136, 119 N. E. 68, L. R. A. 1918 D 1196, 1198.

Phoenix Mutual Life Ins. Co. v. *Bailey.* 13 Wall. 616, 20 L. ed. 501.

Ramsey v. *Old Colony Ins. Co.,* 297 Ill. 592, 131 N. E. 108, 111.

Bankers Res. L. Co. v. *Omberson,* 123 Minn. 285, 143 N. W. 735.

VI.

It is not the law in Iowa, as held by the Circuit Court of Appeals on the first appeal, that "the intention to deceive the insurer is necessarily implied as the natural consequence" of the act of misstating the fact regarding consulting physicians.

Ley v. *Metropolitan Life Ins. Co.,* 120 Iowa 203, 210.

Lakka v. *Modern Brotherhood,* 163 Iowa 159, 170.

Murphy v. *National etc. Ass'n.*, 179 Iowa 213, 222.

Smith v. *Packard Co.*, 152 Iowa 1, 6.

New York Life Ins. Co. v. *Wertheimer*, 272 Fed. 730.

It is the rule of the federal courts that they will follow the rules adopted by the courts of last resort of the state where the cause of action arose, especially in insurance cases.

John Hancock Life Ins. Co. v. *Warren*, 181 U. S. 73, 45 L. ed. 755.

New York Life Ins. Co. v. *Cravens*, 178 U. S. 389, 44 L. ed. 1116.

Equitable Life Assur. Soc. v. *Brown*, 213 U. S. 25, 53 L. ed. 682.

Orient Ins. Co. v. *Daggs*, 172 U. S. 577, 43 L. ed. 552.

"The state where the application is made and where the premium is paid and the policy delivered is that where the contract was entered into."

Mutual Life Ins. Co. v. *Cohen*, 179 U. S. 262, 45 L. ed. 181.

New York Life Ins. Co. v. *Russell*, (C. C. A.) 77 Fed. 94.

Albro v. *Manhattan Life Ins. Co.*, (C. C. A.) 119 Fed. 629.

Equitable Life Ins. Co. v. *Winning*, (C. C. A.) 58 Fed. 541.

Fletcher v. *New York Life Ins. Co.*, 13 Fed. 526.

It is only where the evidence at the second trial is the same as that on the first trial that the rule of "The Law of the Case" can be successfully invoked.

U. S. Annuity etc. Co. v. *Peak*, 129 Ark. 43, 195 S. W. 392, 1 A. L. R. 1259, 1270, note.

Messinger v. *Anderson*, 225 U. S. 436, 56 L. ed. 1152.

After a cause has been remanded for new trial the pleadings may be amended so as to present new issues.

21 R. C. L. p. 590.

Marine Ins. Co. v. *Hodgson*, 6 Cranch 206, 3 L. ed. 200.

Tremaine v. *Hitchcock*, 23 Wall, 518, 23 L. ed. 97.

Adams County v. *Burlington etc. Co.*, 44 Iowa 335.

ARGUMENT.

I.

Purpose and validity of "incontestable" clauses.

(1) The incontestable clause in an insurance policy giving the insurance company a reasonable time within which to investigate and discover fraud, if any, is a valid policy provision, and is not subject to the objection that it is against public policy. It has the effect of a short statute of limitations, but it is in reality an express waiver, after a fixed period, of all defenses which might be set up by the insurance company as grounds for its refusal to pay the amount of the policy, save those defenses which are expressly excepted.

The purpose and object of the incontestable clause is clearly stated in the note to *Duvall* v. *National Life Insurance Company,* 28 Idaho 356, 154 Pac. 632, L. R. A. 1917 E 333, 339 as follows:

> "A distinction is recognized between the clauses considered in the preceding subdivision providing for incontestability from date, and those which provide that the policy shall be incontestable after a certain period. The decisions are in harmony in holding that clauses of the latter character are, where the period specified gives a reasonable time for investigation, valid, and after the expiration of the designated period effectual *to bar the insurer from asserting all defenses not expressly excepted, including fraud on the part of the insured,* the reasoning of the courts being that such provisions merely provide for a short period of

limitations, and where this period is of sufficient length to enable the insurer to discover fraud it is not against public policy."

The author of this note cites in support of this statement of the law numerous cases, including the following:

Arnold v. *Equitable Life Ins. Co.*, 228 Fed. 157.
Mutual Reserve Fund Life Ass'n. v. *Austin*, (C. C. A.) 142 Fed. 398, 6 L. N. S. 1064.
Great Western Life Ins. Co. v. *Snavely*, (C. C. A.) 206 Fed. 20, 46 L. N. S. 1056.
Wright v. *Mutual Benefit Ins. Co.*, 118 N. Y. 237, 6 L. R. A. 731.
Teeter v. *United States Life Ins. Co.*, 159 N. Y. 411, 54 N. E. 72.
Welch v. *Union Cent. Life Ins. Co.*, 108 Iowa 224.

With reference to the nature and effect of this provision, the court says in the case of *Mutual Reserve Fund Life Ass'n.* v. *Austin*, (C. C. A.) 142 Fed. 398, 6 L. N. S. 1064, referring to a three-year contestable period, as follows:

"Continuance of life for three years removes certain risks and affords a reasonable period for the detection of fraud. It has become quite customary for insurance companies to waive warranties and conditions after two or three years. In construing this incontestable clause, we must not lose sight of the fact that it relates, not to the risk at the date of the policy, but at a period of three years later, and to a risk that is different in character."

In *Wright* v. *Mutual Benefit Life Ass'n.*, 118 N. Y. 237, 6 L. R. A. 731, 733, the court says with reference to the effect of such a clause as to the defense of fraud, as follows:

> "It is not a stipulation absolute to waive all defenses, and to 'condone fraud.' On the contrary, it recognizes fraud and all other defenses, but it provides ample time and opportunity within which they may be, but beyond which they may not be, established. It is in the nature of, and serves a similar purpose, as a statute of limitation and repose, the wisdom of which is apparent to all reasonable minds. It is exemplified in the statute giving a certain period after the discovery of a fraud in which to apply for redress on account of it, and in the law requiring prompt application after its discovery, if one would be relieved from a contract infected with fraud. *The parties to a contract may provide for a shorter limitation thereon than that fixed by law;* and such an agreement is in accord with the policy of statutes of that character."

The Supreme Court of Iowa describes the nature of the incontestable clause in *Welch* v. *Union Central Life Ins. Co.*, 108 Iowa, 224, 230 as follows:

> *"Such provisions are held to be in the nature of a statute of limitation or repose and that, as the parties may stipulate as to the time when action may be brought, so they may stipulate as to the time within which it might assert the fraud as against the contract."*

In *Murray* v. *State Life Insurance Co.*, (R. I.) 48 Am. 800, 53 L. R. A. 742, 743 it is said:

> "The practical, and evidently the intended, effect of the stipulation in question, was to create a

short statute of limitations in favor of the insured, within which limited period the *insurer must, if ever, test the validity of the policy.* It has repeatedly been held that an agreement limiting the time within which an action may be brought upon a policy of insurance is not against public policy, and may be enforced, though less than the usual time imposed by law has been fixed. * * * To hold the company bound by such an undertaking is not to violate any rule of public policy, but is simply to compel it to fulfill its plain and deliberately assumed obligations." * * *

(2) *The incontestable clause was adopted by the insurance companies, ostensibly for the benefit of the insured, but in reality for the benefit of the companies themselves. It has the effect of allaying the apprehensions of the insured, and thus enable the companies to increase their business.*

"The object of the clause is plain and laudable, to create an absolute assurance of the benefit, as free as may be from any dispute of fact except the fact of death, and as soon as it reasonably can be done."

Mutual Life Ins. Co. v. *Johnson,* 254 U. S. 96, 65 L. ed. 155.

"To free the mind of the applicant for life insurance from apprehension raised by these numerous conditions and warranties, and to assure him that his beneficiary shall have a clear and incontestable right, is the ostensible purpose of the incontestable clause. A construction which reads into it as permanent provisions the very conditions which apparently it was designed to terminate

makes it not only inoperative, but exceedingly deceptive."

Mutual Reserve Fund Life Ass'n. v. *Austin,* (C. C. A.) 142 Fed. 398, 402, 6 L. N. S. 1064.

"This clause, which has been generally adopted by the insurance companies, is not primarily for the benefit of the insured, but for the benefit of the insurance company itself. * * * The companies adopted the incontestable clause for the purpose of increasing their business."

American Trust Co. v. *Life Ins. Co.,* 173 (N. Car.) 558, 92 S. E. 706.

"The incontestable clause of the policy was evidently carefully framed by the company itself, and expressly framed to induce people to insure, and reserved the right to contest a recovery on the policy on only one ground, aside from the military or naval one, and that was a failure to pay premiums."

Duvall v. *National Life Ins. Co.,* 28 (Idaho) 356, 154 Pac. 632, L. R. A. 1917 E. 333.

"The acceptance by the insured of this clause makes the contract as binding as would a statute on the subject. Statute and contract would be equally binding. The company, in order to promote its business and increase its popularity as an insurer, inserted this clause in the policy, and offers it as an inducement to take insurance. It uses it to the best advantage. The parties to a contract can adopt a prescriptive term."

Mutual Life Ins. Co. v. *New,* 125 La. 41, 51 So. 61, 27 L. N. S. 431, 434.

Such is the view of the courts with reference to what counsel for petitioner refer to as "the self-imposed limitation on its right to contest" its own contract.

(3) Counsel for petitioner contend in substance that since there was *fraud in the inception of the policy,* and since fraud is established by proof and by this court's decree, which is both contrary to the fact and the law, so far as this case is concerned, because a new trial has been granted and the case stands as if no former trial has been had and as if no opinion had been written, the *policy was void and the incontestable clause never had any force* or effect to bind the insurance company.

Counsel cite no authorities in support of this contention. The reason why they cite none is because the authorities are all against them on the proposition.

> "It is not true that because a policy is procured by misrepresentation of material facts it is therefore to be treated, in the sense of the law, as utterly void *ab initio.* It is merely voidable, and it may be voided by the underwriters upon due proof of the facts; but *until so avoided it must be treated for all practical purposes as a subsisting policy."*
>
> *Carpenter* v. *Providence Ins. Co.*, 16 Pet. 495, 509, 10 L. Ed. 1044, 1050.
>
> See *Mutual Res. Fund Life Ass'n.* v. *Austin* (C. C. A.), 142 Fed. 398, 6 L. N. S. 1064.
>
> *Mohr* v. *Prudential Life etc. Co.*, 32 (R. I.) 177, 78 Atl. 554.
>
> *Commercial Ins. Co.* v. *McGinnis,* 50 Ind. A. 630, 97 N. E. 1018.

> "The contention of the appellee is that as the contract of insurance was obtained through fraud, it was void *ab initio,* and therefore there never was a legal contract to which the limitation agreed upon can be applied. * * * We are of the opinion that the incontestability clause in this contract

should be interpreted to include all defenses other than non-payment of dues."

Drews v. *Ins. Co.*, 79 N. J. L. 398, 75 Atl. 167, 168.

In *Arnold* v. *Equitable Life Ins. Co.*, 228 Fed. 157, where the clause was, "This policy becomes incontestable * * * one year from its date of issue," is is said:

> "Does the 'incontestable clause' in this policy prevent the defendant from making the partial defense pleaded herein? These clauses have been uniformly upheld, and uniformly construed against the insurer. It has been seriously contended that such clauses should not be efficient as against actual fraud; but, even in the most gross frauds, it is now well settled that the incontestable clause is effectual."

In *New York Life Ins. Co.* v. *Baker,* (C. C. A.) 83 Fed. 649, 27 C. C. A. 658, where the insured died within the year, and it was contended that the policy never took effect as a contract because statements to the medical examiner were false, it was held that their falsity merely rendered the policy voidable at the election of the insurer, as is provided that it should be incontestable after one year, and contained no stipulation that a false statement should render it void. Therefore the company could waive the breach of warranty, or could estop itself by its conduct from taking advantage thereof.

In *Mutual Reserve Fund Life Association* v. *Austin* (C. C. A.), 142 Fed. 398, 6 L. N. S. 1064, it is held that a provision in an insurance policy that, if the policy shall have been in continuous force for three years, it

shall thereafter be incontestable, cannot be held to be inapplicable to a policy delivered when the insured was not in good health, on the theory that because the policy provided that it should not take effect until delivered while the insured was in good health, it never was in force.

II.

When the Contestable Period Begins and Ends.

The contestable period should be computed from the date the policy bears, not from the uncertain date of delivery or from any other uncertain date, in the absence of an express agreement, and the two-year period ends two years from the former date. This, in brief, was the holding of the Circuit Court of Appeals in this case and that holding appears to be fully justified by the wording of the policy. The material parts of the policy are the following, the italics being ours:

"THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, in consideration of the *annual premium* of one thousand and sixty-nine and 75/100 dollars the receipt of which is hereby acknowledged, and of the payment of a like amount upon each *23rd day of August hereafter* until the death of the insured, promises to pay upon receipt of due proof of the death of Rudolph Hurni * * * the amount of twenty-five thousand dollars, * * * to Hurni Packing Company of Sioux City, Iowa, * * *

"All premiums are payable in advance at said home office, or to any agent of the company upon delivery on or before *the date due* of a receipt signed by the president * * * and countersigned by said agent * * *

"SUICIDE. The company shall not be liable hereunder in the event of the insured's death by his own act, whether sane or insane, during the period of one year after *the date of issue* of this policy, as set forth in the provisions of the application endorsed hereon, or attached hereto."

"INCONTESTABILITY: This policy shall be incontestable except for non-payment of premiums provided two years shall have elapsed from its date of issue. * * *

"IN WITNESS WHEREOF *the company has caused this policy to be executed this 23rd day of August,* 1915" (Trans. pp. 2-4, 84-86).

The APPLICATION, which is expressly made a part of the policy, contains the following:

"Application of Rudolph Hurni for insurance.

"Date of Policy, August 23, 1915; Age 47. This application is made to the Mutual Life Insurance Company of New York" * * *

"I agree that any policy the company may issue upon this application shall contain the following clause:

" 'If the insured shall engage in such military or naval service * * * within *the first policy year,* and shall die within one year of the date of the beginning of such service * * * the Company's liability here-

under shall be limited to one-fifth of the face of the policy' * * *

"During the period of one year following *the date of issue* of the policy, for which application is made, I will not engage in any of the following extra hazardous occupations. * * * It is understood and agreed that the risk of death will not be covered by the policy if such death occurs by my own act, whether sane or insane during the period of one year next following *the date of issue.* * * *" (Trans. 4-6).

It will be noted that the language used as above quoted is such as would lead the average policy holder to believe that the period of his obligations began on the date of the execution of the intrument, as it recites, to-wit: "August 23, 1915," and that for all practical purposes no other date became a part of the contract. Each twenty-third of August *hereafter* means *after the date the policy bears,* not after some uncertain date.

It will also be observed that the words "*The* date of issue" appear three times in the policy and application. The "Incontestability" clause contains the words "*its* date of issue," instead of "*the* date of issue." If there is any significance in using the possessive pronoun in place of the definite article, "the," the possessive would point to the date which the policy bears, as its date of execution, and thus fix the beginning of the contestable period as August 23, 1915.

It should be further noted that the policy contains the words, "a like amount upon each 23rd day of August *hereafter,*" in referring to the annual premium, and the

further statement that *"the company* has caused these presents to be executed this 23rd day of August, 1915," and in addition the terms of the policy require the applicant to agree that he will not engage in military or naval service within "the first policy year." Now *the first premium year and the "first policy year" both commenced August* 23, 1915, *and ended August* 23, 1916. *That being true, the second policy year ended August* 23, 1917, *or before the petitioner determined at its New York office that it would not pay the insurance.* In the absence of express language to the contrary, the beginning of the measurement of time under the policy should be uniform throughout. The contestability period should likewise commence with the date, August 23, 1915.

It is a universal custom, prompted by different considerations, not only to ante-date but to post-date contracts. Giving a contract an arbitrary date does not affect its validity in any respect, and the arbitrary date fixed in the contract is the date from which all periods of time provided for in the contract are computed, unless the language clearly indicates the contrary. How simple and easy it would have been, if the Insurance Company wished to preserve to itself the full two year period from the date of delivery, to have so provided in its contract. The fact that it did not so provide is the very best evidence that it did not intend that the two year contestable period should begin with the delivery. The average business man and average policy-holder would instantly say, in looking at this contract, that the period of con-

putation of time not only with reference to the insured but with reference to the insurer, begins with the date the contract was executed, as shown by the instrument, to-wit, August 23, 1915.

(1) *The insurance company can adopt any reasonable time as its contestable period.*

It can by contract provide that the period shall commence with the date which the policy bears, or the date of medical examination, or the date of the actual delivery of the policy.

The date of the delivery of the policy is, as heretofore stated impractical, because it is lacking in uniformity and certainty. If the policy provided for annual premiums it might be somewhat difficult to have a uniformly certain date to use as a basis of premium payment. The company exists by means of its premiums and not only that, but the insured must have a date about which there can be no doubt or misunderstanding. Moreover, to make an insurance policy operative from its date of delivery, the Company having already fixed the date of premium payment at the date the policy bears would create an incentive on the part of the insurance company to delay the date of delivery as long as possible and thus shorten the risk period. *For this court to hold that the premium obligations should mature on one date and the company obligations on a different date would be adopting a rule which would lead to uncertainty and confusion, and a rule which would benefit only the Insurance Company.* The same objections would lie to the adoption of the date of the medical examination. The date the

policy bears is a certain one. The insured and the insurer both have a record of that date, and by the issue and acceptance of the policy they mutually adopt that date as the date from which all premium payments, as well as the other conditions of the policy shall be computed. The policy provides that:

> "In consideration of the annual premium of One Thousand Sixty Nine Hundred and seventy-five hundredths dollars, * * * and the payment of a like amount upon each 23rd day of August *hereafter* till the death of the insured," etc. (Trans. p. 3).

August 23rd is used for determining the date of premium payments, and there is no logical reason why the date adopted for premium payments thus fixing the obligation of the insured, should not fix the date when the contestable period shall begin, and the date from which to compute the period in which investigation may be made by the company to discover fraud, if any, on the part of the insured.

If the date which the policy bears, and the date upon which it appears to have been executed is the date of issue then the Insurance Company had two years less the predating period, in which to make the contest. Certainly *it could predate its contestable period as easily as it could predate its policy in order to make the premium payments mature earlier.* If it got the benefit of the latter, why should it not be held to surrender the former, especially in view of the fact, that an Insurance Company may fix any reasonable period in which to contest

a policy and certainly no one will contend that one year and forty-nine weeks was an unreasonably short time.

Counsel for the Insurance Company want the obligations of the insured to commence on August 23, the date of the policy, and they want the company's obligations to commence September 13th, the uncertain date of delivery. By reason of the predating of the policy, a consideration extended by the Company to the insured as an inducement the latter was obliged to pay his second premium at the end of forty-nine weeks instead of fifty-two. Meanwhile, the company got a premium for fifty-two weeks, but in fact insured Mr. Hurni for only forty-nine weeks because he had already lived three weeks of the period for which insurance was collected. For this period the insurance company sustained no risk whatsoever. It was glad to accept the benefits but when it comes to measuring its obligations it wants to do so in accordance with an entirely different rule.

(2) *The contestable period of the Hurni policy began August* 23, 1915.

The authorities without exception sustain counsel for respondent, as clearly appears from the following:

> "The period fixed by law being intended for the benefit of the parties interested in the contract, and for their protection, it is competent for them to stipulate that the time which the law gives them to act shall be shortened, on the one hand, or lengthened on the other."
>
> *Mass Benefit Life Ins. Co.* v. *Robinson*, (Ga.) 30 S. E. 918, 42 L. R. A. 261, 269.

> "A provision in a policy for nonreliability in the event of suicide within one year 'after the issuance'

of the policy means a year from its date where the premiums are paid from its date, and the other parts of the policy show that the day of its date was considered the day of its issuance."

14 R. C. L. 1233, citing

Anderson v. *Mutual Life Ins. Co.*, 164 Cal. 712, 130 Pac. 726.

Harrington v. *Mutual Life Ins. Co.*, 21 N. D. 447, 131 N. W. 246, 34 L. N. S. 373.

"Under a provision that the policy shall be incontestable after a specified period from date, the time runs from the date of the policy, and not from the date of its subsequent delivery, and the fact that the insured was not in good health, as required by the policy, when it was delivered, is immaterial."

14 R. C. L. 1201.

"The clause in the last certificate relating to suicide invalidates it if suicide is committed 'within three years from the date of this certificate.' This should be construed to have reference to the time specified in the instrument. * * * The date is the important part of the instrument, and, when coupled with another provision relating to when something is to be done, should not be disregarded. Especially is this true where the instrument is executed as a substitute for another and *the date* of the original *designedly inserted.* As said in *Bement* v. *Trenton etc. Mf'g. Co.*, 32 N. J. L. 513: 'the primary signification of the word "date" is not time in the abstract, nor time taken absolutely, but as its derivation plainly indicates, time given or specified, time in some way ascertained or fixed; this is the sense in which the word is commonly used. *When we speak of the date of the deed, we do not mean the time when it was actually executed, but the time of its execution, as given or stated in the deed itself. The date of an item or of a charge in a book account is not necessarily the time when the article charged*

was in fact furnished, but simply the time given or set down in the account, in connection with the charge.' Moreover, *if the instrument is open to different constructions, that most favorable to the insured should be adopted.* Death having occurred more than three years subsequent to the date of the certificate, that it was suicidal did not constitute a defense to the second certificate."

Wood v. *American Yeomen*, 148 Iowa 400, 404.

"In order to avoid the effect of the one-year clause after which the policy could not be contested, the company alleged, and now contends, that while the policy bears date June 8, 1914, yet, as a matter of fact, the policy was not delivered, or the first premium paid, until June 13, 1914; and that Milam having died on June 8, 1915, he died within a year 'from the date' of the policy.

"We see no merit in this contention. While it is true that insurance companies frequently, and we believe usually, do not deliver a policy upon the day of its date, nevertheless *all the provisions of the policy as to payments of future premiums, its maturity, if it runs for a term, and similar provisions are calculated from the day of its date.* Of course, the insured can contract for a policy to be dated on any date after the date of his application, but as a matter of routine business, policies are usually dated either according to the date of the application, or of its execution, and are subsequently delivered without any question being made upon that subject. But the rights of the parties to the contract are determined by the date, and all future premiums are to be paid accordingly."

Meridian Life Ins. Co. v. *Milam*, 172 Ky. 75, 188 S. W. 879, L. R. A. 1917 B 103.

"The insured paid the appellant for carrying the said insurance from September 30, 1903, and the policy provided if the policy should remain in con-

tinuous force, 'two years from the date hereof'—that is, from September 30, 1903—it should be incontestable except for nonpayment of premium. We do not see, therefore why the date from which the two years should commence to run should not be held to be September 30, 1903. If, however, the two clauses found in the policy—that is, the clause which provided if the policy should remain in force 'two years from the date hereof,' and the clause which provided the policy should not become binding on the company until the first payment should have been made and the policy delivered—are to conflict with each other and render the time uncertain from which the two years in which the policy might be contested should commence to run, we think the first clause—that is, that the policy should be incontestable if it remained in continuous force after two years from the date thereof—*should be held to control, as that construction would be favorable to the insured*, as the rule is that the language of an insurance policy, when uncertain or ambiguous, is always to be construed in favor of the insured and more strongly against the insurance company * * * Our conclusion is that the policy became incontestable two years after September 30, 1903, if it continually remained in force from that date for two years."

Monahan v. *Fidelity Mut. Life Ins. Co.*, 242 Ill. 488, 90 N. E. 213, 214.

"It is perfectly competent for the parties to agree that a policy shall be antedated and, when this is done, the policy takes effect by relation from the date agreed upon. * * * In the absence of evidence to the contrary, a policy will be presumed to take effect upon its date. * * * The policy here sued upon, therefore, must be construed as effecting an insurance upon the life of Anderson for a period beginning May 22, 1908. The day upon which, by the agreement of the parties, the risk attached, may

reasonably be taken to be the day which was meant to be designated, in the clause under consideration, as that of the 'issuance' of the policy. *The company inserted in the policy the various provisions above referred to, securing to itself various benefits which would naturally pertain to an insurance issued on the twenty-second day of May, rather than one issued at a later time. It thus became entitled to an earlier payment of premiums; it also received payment for insuring the life of Anderson during a period which had already elapsed when the policy was actually signed and delivered. The policy, then, having been written so as to take effect for its main purpose and its principal incidents, as of the twenty-second day of May, a clause which speaks of the time of 'issuance' of the policy is fairly to be taken to refer to that date."*

Anderson v. *Mutual Life Ins. Co.*, 164 Cal. 712; 130 Pac. 726, Ann. Cas. 1914 B. 903, 904.

"The first proposition presented to us raises the question of the date of the policy which is stated 'to be executed this 9th day of May, 1908.' *The general rule is that a policy of insurance, if delivered, takes effect from its date, unless it be otherwise stated.* See May, Ins. 2d edition Sec. 400. *If it be alleged that the contract takes effect at some other date, then evidence of this contrary intent must be shown.* Of course, the burden of introducing such evidence would be upon him who alleges it. * * * To get this benefit, the policy was dated back some nine days, which would be as of three or four days less than forty-two years and six months old. The company got the benefit of this, for it is a certainty of life on which they assumed no risk, and for which they were paid. Clearly, it was the intention of the parties to make the date as of the 9th of May, 1908. The contract, therefore, was made as of May 9, 1908.

"Appellant says the fact that the company agreed to the dating back does not estop them from raising this question, because the dating back was but for one purpose, and that was the fixing of the date of payment of the premiums. We cannot agree with this in its entirety. The purpose for the dating back of the contract may have been to get a little less rate of premium; but the fact stands that *the contract itself was dated back; that is, the whole contract, and not the portion alone dealing with the insurance rate.* If the contention of the appellant were correct, the purpose could have been obtained by simply making the contract as of its correct date, but lowering the rate of insurance. Instead of doing this the company maintained its uniform rate, but takes a retrospective risk. * * * The company took premiums for that period, fixed the date of the payment of the premiums as of that date, and made no provision in the contract limiting the dating back solely to the payment of premiums. It is well settled that where there is any uncertainty in the terms of an insurance policy, that the policy will be construed most favorably for the insured, as the language used in the policy is the language of the insuring company. The company prepares the blanks, dictates the terms, and it would be idle to say that the insured need not accept the terms, unless he sees fit."

Harrington v. *Mutual Life Ins. Co.*, 21 N. D. 447, 131 N. W. 246, 34 L. N. S. 373, 377, 378.

On this point the opinion of the Circuit Court of Appeals in this case (280 Fed. 22) states the law clearly as follows:

"In the absence of any qualifying language the date of the policy is always taken to mean the date of issue. * * * We must take the date agreed

upon as the date of the policy for all purposes affected thereby. It is a matter of common knowledge that no policy bears a date identical with that of delivery, or of conditions and happenings governing the time when it became effective. These incidents are rarely regarded as conditioning the date of the issue or execution as evidenced by the date appearing upon the face of the policy. If it had been the purpose of the insurer to depart from the customary rule of construction and interpretation in this respect, it could, and would, have adopted language expressive of that purpose. Instead of 'date of issue' it would naturally have provided that the two years should elapse 'from date of delivery' or 'from the date the policy becomes effective,' or from the 'time' instead of 'date' of issue. It may be further noted that the language used is *its* date of issue: thereby referring more obviously to the date borne by the policy itself."

(3) *Counsel for petitioner would have the court give a different meaning to the words "date of issue."*

They contend that emphasis should be placed on the word "issue" and that "to issue" means "to put forth," to "emit," "to give effect to," "to deliver for use," "delivery." They cite Webster's Dictionary. A good dictionary will give synonyms covering the entire range of use, but the meaning of "issue" in relation to insurance policies may best be determined by the language of the courts in cases in point. The language of those decisions which bear on the question make it very clear that the phrase, "to issue," in an insurance policy is not synonymous with "to deliver."

In *Kansas Mutual Life Ins. Co.* v. *Coalson*, 22 Tex. Civ. App. 64, 54 S. W. 388, 392, it became necessary to

construe the meaning of "issued" in a policy of life insurance. The court said:

"Without entering into a discussion of the distinctions sought to be drawn by counsel as to the technical meaning of the word 'issue' and its meaning as ordinarily used we will dispose of the question *by saying that it is undoubtedly used both by the laity and profession as not including within its meaning a technical delivery,* and the court was correct in holding that the facts proved did not constitute a breach of warranty."

In the case of *Stringham* v. *Mutual Life Ins. Co.,* 44 Ore. 447, 75 Pac. 822, the policy provided that it should take effect when signed by the secretary of the company "and issued." The insured died after the policy was executed and before it was actually delivered to him. The defense was based upon the theory that the policy had not been issued because it had not been delivered. The court said:

> *"We conclude therefore that the term 'issued' was used as indicative of the completed signing up and execution of the instrument, making it ready for delivery.* This construction is suitable and reasonable, although it must be admitted that the term employed is not without ambiguity. But if it may be said that it is susceptible of two constructions, and there is a doubt as to its true meaning, then it should be construed as we have construed it, most strongly against the insurer. Kerr Ins., Par. 65; Berryman 3 Digest Law Insurance, Par. 3012."

The authority of these cases is founded in reason. The policy is actually issued by the company at its home office. The home office absolutely controls the acceptance

or non-acceptance of the risk. Execution of the instrument marks the acceptance by the company of the risk, and in the absence of a stipulation to the contrary binds the company. The act of the home office marks the "issuance" of the policy. Execution and issuance are synonymous. That the defendant in this case recognizes the truth of this assertion is clearly shown by the fact that it inserts in its form of application the express provision, which the applicant is compelled to sign, that "the proposed policy shall not take effect * * * *unless also* the policy shall have been *delivered to and received by me* during my continuance in good health." The company has clearly differentiated between *issuing* and *delivering*, and when it means *delivery*, it says so in no uncertain terms. If the company had meant the incontestability period as well as the period of risk to start running at the time of delivery instead of the date of the policy what would have been more simple and natural than that it should say so in the same clear and unmistakable language. In the absence of such a stipulation the company must be bound by the conventional date of issue as it appears in the testimonium of the policy, even as the insured is bound by that date in the payment of the premiums. The Circuit Court of Appeals was therefore correct in its conclusion in saying that: "By agreement the conventional *date of execution, and hence the issue*, was the 23rd day of August, 1915. In absence of any qualifying language, the date of a policy is always taken to mean the date of its issue; and the language of an insurance policy when uncertain and ambiguous has al-

ways been construed in favor of the insured and more strongly against the insurance company. So the courts have uniformly held."

Furthermore "date" means time given to or specified in a document. Such is its customary meaning. Such is the meaning one would expect from the derivation of the word from the Latin "datum." *"Its date"* can mean but one thing: That date which is fixed by it and specified in it as its date of execution. Since, in the language of insurance policies, issuance and execution are synonymous, "its date of issue" is merely a different way of expressing "its date of execution" which in the Hurni policy is stated over the signature of the president and secretary to be "August 23, 1915."

Even if "issue" meant "delivery for use" as the petitioner insists, still "its date of issue" can mean nothing other than the date set forth in the policy. "Its date" has a definite and unmistakable meaning when the derivation of the word is borne in mind, namely, the time given to or specified in the policy. Regardless of the meaning ascribed to the word "issue" the parties to the policy were competent to fix any date they chose as the agreed "date of issue." The date which they agreed upon and which they gave to and specified in the policy as its date of issue—the only date in the policy—is August 23rd, 1915. "Its date of issue" can mean no other date.

(5) *Analogous cases support a like conclusion.*

In cases of bond and note issues, as in case of insurance policies, it is impracticable that the date of de-

livery be the date appearing in the bonds and notes. In *Yessler* v. *City of Seattle*, 1, Wash. 308, 25 Pac. 1014, the Washington Supreme Court considered such a situation. The statute required that certain bonds bear their "date of issue." The bonds were not delivered until some time after their date. The question arose as to whether or not they should bear interest during the interval. The court said:

> "In financial parlance the term 'issue' seems to have two phases of meaning. *'Date of issue' when applied to bonds, notes, etc., of a series usually means the arbitrary date fixed at the beginning of the term for which they run,* without reference to the precise time when convenience or the state of the market may permit of their sale or delivery, and we see no reason why the act of March 26, 1890, should not have that interpretation. When the bonds are delivered to the purchaser, they will be 'issued' *to him* which is the other meaning of the term."

In that case the court recognized the possibility of construing the "date of issue" to mean "the date of issue *to him*," namely, to the purchaser, but it considered such a construction of no merit as compared with the one which it adopted, even though the construction adopted resulted in payment of interest on bonds not "yet delivered for use" or "put into circulation." This case is frequently cited and quoted with approval.

A like question arose in *State* v. *Blease*, 95 S. C. 403, 79 S. E. 247 at 256. There the court said:

> "The petitioners' next contention is that though consols issued under the act of 1892 are all

dated Jan. 1, 1893, they were not actually issued until later dates, and as the act reserves to the state the right to redeem at any time after 20 years from 'the date of issue' the commission has no right to call and redeem until after 20 years from the dates when they were actually issued. The phrase 'date of issue' means the dates which the bonds and stocks bear and not the dates when they were actually issued in the sense of being signed and delivered and put into circulation."

Quotations from authorities and precedents are the following:

"The date of a deed does not mean the time when it was actually executed, but the time of its execution, as given or stated in the deed itself."

17 C. J. 1170.

Bement v. *Trenton etc. Company,* 32 N. J. L. 513, 515.

"A provision in a policy for non-liability in the event of suicide within one year 'after issuance' of the policy means a year after its date, when premiums are paid from its date, and other parts of the policy show that the day of its date was considered the day of its issuance."

14 R. C. L. 1233.

Anderson v. *New York Mutual Life Ins. Co.,* 164 Cal. 712, 130 Pac. 726.

Ann. Cs. 1914 B 903.

Harrington v. *Mutual Life Ins. Co.,* 21 N. D. 447, 131 N. W. 246, 34 L. N. S. 373.

"It quite satisfactorily appears to us that the policy issued by the defendant must be considered as commencing on the 18th, the day of its date. It was in fact issued on that date, and the premiums covered the time intervening between that date and the date of its delivery on the 22nd. The defendant after having collected the premium, and

delivering the policy bearing date the 18th, cannot be heard to deny that the policy did not operate till its delivery. If the policy did not bind the defendant until the 22nd, then has the defendant received premiums for the time intervening before that date, and the 18th which it has not earned. But this cannot be permitted to claim."

Hubbard v. *The Hartford Fire Ins. Co.*, 33 Ia. 325, 327.

"The general rule is that a policy, if delivered, takes effect from its date, unless it be otherwise stated, or unless there is evidence of a contrary intent. If the premium be paid, and the policy be not delivered till afterwards, the policy takes effect by relation as of its date, even though a loss intervenes. May Ins. 400; *Ruse* v. *Mutual Ben. L. Ins. Co.*, 23 N. Y. 516; *Whitaker* v. *Farmers Union Ins. Co.*, 29 Barb. 312; *Lightbody* v. *North American Ins. Co.*, 23 Wend. 18; *Davenport* v. *Peoria Marine & Fire Ins. Co.*, 17 Iowa, 276."

Union Insurance Co. v. *American Fire Insurance Co.*, (Cal.) 40 Pac. 431, 28 L. R. A. 692, 693.

"Whether a risk be commenced when the contract for insurance is made, or only when the policy issues, must depend on the terms of the contract. Where, as in the present case, there is an express contract to take the risk from a past day, there is no room for any understanding that it is not to commence until a future day. Such an understanding would be directly repugnant to the express terms of the contract."

Commercial Mutual Marine Co. v. *Union Mutual Ins. Co.*, 19 How. 319, 15 L. ed. 636, 638.

III.

The "Incontestable" clause should be construed liberally in favor of the insured.

If there is any question as to the construction to be placed upon the words "its date of issue" as used in the incontestable clause, those words should be construed to refer to the date of the instrument rather than to the date of the delivery, or any other, for the reason that under the uniform holdings of the courts the policy must be "construed most strongly against the insurer and liberally in favor of the insured."

> "There is, in our opinion, no room for a different interpretation. If the construction were doubtful, then the case would be one for the application of the familiar rule that the words of an instrument are to be taken most strongly against the party employing them and, therefore, in cases like this, most favorably to the insured. The words are those of the company. If its purpose was to make notice to the person procuring the insurance of the termination of the policy, equivalent to notice to the insured, a form of expression should have been adopted which would clearly convey that idea, and thus prevent either party from being caught or misled."
>
> *Grace* v. *American Central Insurance Co.*, 109 U. S. 278, 27 L. Ed. 932, 934.

"It is further to be observed that if the language used in this policy or certificate can fairly be said to admit of two interpretations, and to be of doubtful construction, the court shall construe the provisions of the contract strictly as respects the company, and liberally as regards the insured, because the language employed is that of the insurance company. If the construction be doubt-

ful, or the meaning obscure, it is the fault of the company."

Burkheiser v. *Mutual Accident Ass'n.*, (C. C. A.), 61 Fed. 816, 26 L. R. A. 112, 114.

"It is settled, as laid down by this court in *Thompson* v. *Phenix Ins. Co. of Brooklyn*, 136 U. S. 287, 34 L. Ed. 408, that, when an insurance contract is so drawn as to be ambiguous, or to require interpretation, or to be fairly susceptibly of the two different constructions, so that reasonable intelligent men on reading the contract would honestly differ as to the meaning thereof that construction will be adopted which is most favorable to the insured."

Imperial Fire Ins. Company v. *County of Coos*, 151 U. S. 452, 38 L. Ed. 231, 235.

"But, without adopting either of these constructions, we rest the conclusion already indicated upon the broad ground that when a policy of insurance contains contradictory provisions, or has been so framed as to leave room from construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligations of a warranty. The company cannot justly complain of such a rule. Its attorneys, officers or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud, and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself."

First National Bank v. *Hartford Fire Ins. Co.*, 95 U. S. 673, 24 L. ed. 563, 565.

"We have a case, then, for construction of these seemingly ambiguous and conflicting provisions. The tenets established for the guidance of the courts in such matters are well understood, and no one is better established than in all cases the policy must be liberally construed in favor of the assured, so as not to defeat, without plain necessity, his claim for indemnity."

Goodwin v. *Prudential Ins. Co.*, 97 Iowa. 226, 233.

"If there is a reasonable doubt as to the extent of the application of the "incontestable clause," it must be resolved in favor of the beneficiary."

Mareck et al. v. *Mutual Reserve Fund Life Ass'n.*, 62 Minn. 39, 64 N. W. 68, 69.

IV.

Effect of Death Within the Contestable Period.

The death of the insured within the contestable period does not arrest the running of the short statute of limitations adopted by the parties. The insurer must nevertheless take some "affirmative action" either by bringing suit or by making defense to a suit within the stipulated time.

This rule is supported by a number of authorities Counsel for the Packing Company have been unable to find any authority to the contrary. Nevertheless counsel for petitioner contend that the insured must live two years in order to make the incontestability clause applicable" (Brief, p. 24).

In support of this proposition, counsel do not give us the benefit of a single authority.

(1) It is the rule that the death or insanity of one who is entitled to the benefit of the general statute of limitation, does not prevent the continued running of the statute. Neither is the running of the statute arrested so as to prevent an action to rescind a contract provided the period of the statute has once begun.

In *Black* v. *Ross,* 110 Iowa, 112, 113, the court states the rule, as follows:

> "After the statute of limitations once commences to run, it is not tolled by the subsequent disability of him in whose favor the cause of action exists; or, as tersely put in *Cotterel* v. *Dutton,* 4 Taunt. 828: 'When once the statute begins to run, nothing stops it.' * * * The exception in favor of minors and insane persons contained in section 3453 of the Code applies only to such causes of action as accrue during disability. *Grether* v. *Clark*, 75 Iowa, 386; *Bishop* v. *Knowles,* 53 Iowa, 286. And such has been the construction of similar statutes in other jurisdictions. *McDonald* v. *Hovey, supra; Bradstreet* v. *Clarke,* 12 Wend. 602; *White* v. *Latimer,* 12 Tex 61. This action was not brought until ten years and ten months after the note sued on fell due, which occurred nine years and four months before Black became insane, and as the running of the statute was not interrupted or suspended by that disability it was barred by section 3447 of the Code, limiting the time within which suit on a written contract must be begun to ten years. As there is no conflict in the long line of authorities extending so far back that the memory of man runneth not to the contrary, it is quite enough to call attention to a few of these."

In *Malone* v. *Averill,* 166 Iowa 78, 83, the same court further says:

> "We then have directly presented the question: Where the cause of action was not barred at the time of the death of the party sought to be charged, but the period of limitation had fully passed before the claim was filed against the estate, is the statute of limitations tolled to the extent of one year, the time within which claims may be filed? It is the contention of the appellant as to this branch of the case that the death of the party charged arrested the running of the statute, and that if the claim was presented within the period limited by the statute for filing claims against the estate, that the plea in bar will not avail. *While there are cases outside of our state which hold to the doctrine that the death of a party tolls the right of action upon a claim not barred at such time,* and that the suit is timely if brought within the period in which claims may be filed against the estate, *this court has held differently,* applying the general rule of the statute as given in Code, Section 3447."

In *Ackerman* v. *Hilbert,* 108 Iowa, 247, it is held that the statute of limitations is not tolled by the death of a person after the statue has commenced to run in his favor.

This court in *McDonald* v. *Hovey,* 110 U. S. 619, 28 L. Ed. 269, 272, after a review of the English and American authorities with reference to the effect of certain Federal statutes of limitations, says:

> "In view of these authorities and of the principles involved in them and from a careful consideration of the language of the law itself, we are satisfied that it was not the intention of Congress

> * * * to change the rule which has always, from the time of Henry Seventh, been applied to statues of limitation, namely; the rule that no disability will postpone the operation of the statute unless it exists when the cause of action accrues; and that when the statute begins to run no subsequent disability will interrupt it."

Likewise it is held in the following cases that the death of the insured within the contestable period does not prevent the running of the period, nor release the insurer from the necessity of taking affirmative action.

New York Life Ins. Co. v. *Baker,* 83 Fed. 647, 27 C. C. A. 658.

Wright v. *Mutual Benefit Life Ass'n.,* 118 N. Y. 237, 6 L. R. A. 731, 733.

Ebner v. *Ohio State Life Ins. Co.,* 69 Ind. A. 32 121 N. E. 315, 317.

Prudential Life Ins. Co. v. *Lear,* 31 App. D. C. 184.

Jefferson Standard Ins. Co. v. *Wilson,* C. C. A. 260 Fed. 593.

American Trust Co. v. *Life Insurance Co.,* 173 N. C. 558, 92 S. E. 706.

Monahan v. *Metropolitan Life Ins. Co.,* 283 Ill. 136, 119 N. E. 68, L. R. A. 1918D. 1196.

Plotner v. *Northwestern Nat'l Life Ins. Co.,* (N. D.) 183 N. W. 1000, 1004.

Ramsay v. *Old Colony Life Ins. Co.,* 297 Ill. 592, 131 N. E. 108, 110.

Hardy v. *Phenix Mutual Life Ins. Co.,* 180 N. C. 104 S. E. 166.

In *Wright* v. *Mutual Benefit L. Ass'n.,* 118 N. Y. 237, 6 L. R. A. 731, 733, the contestable period was two years. The policy was dated December 8, 1883.

The insured died June 4, 1885, and the action was commenced March 8, 1886. No claim was made that death arrested the running of the incontestable period, although such an issue might have been presented.

In *New York Life Ins. Co.* v. *Baker,* 83 Fed. 647, 27 C. C. A. 658, the insured died within the year, and it was contended that the policy never took effect as a contract because statements to the medical examiner were false. It was held that their falsity merely rendered the policy voidable at the election of the insurer, as it provided that it should be incontestable after one year, and contained *no stipulation that a false statement should render it void.* Therefore the company could waive the breach of warranty, or could estop itself by its conduct from taking advantage thereof.

In *Jefferson Standard Life Insurance Company* v. *Wilson,* (C. C. A.) 260 Fed. 593, it was held that an insurance company which, after the death of the insured, brought suit to enjoin action on a life policy, alleging as ground for equitable relief that the policy would become incontestable a year from its date, and that action on the policy was being delayed till the expiration of the year, is estopped to claim in that suit that the running of the year for contest was suspended by the insured's death.

In *Ramsay* v. *Old Colony Life Ins. Co.,* 297 Ill. 592, 131 N. E. 108, 110, it is said:

> "It is true that the cause of action upon the policy accrues upon the death of the insured, and the policy then becomes payable according to its

terms, but *the terms of the contract are not changed by the death of the insured.* The right to contest the policy does not then become an absolute and unlimited right, but it is still controlled by the provision of the contract that it must be exercised within one year from the date of the policy. The company is not relieved from the obligation of its contract to ascertain all the facts material to its liability and cancel or rescind the contract within the time or be barred from thereafter testing the liability."

In *Plotner* v. *Northwestern Nat'l Life Ins. Co.,* (N. D.) 183 N. W. 1000, the insured died within one year contestable period. The court says:

> "So by analogy it would appear that, where in this, the defendant specified that after the expiration of one year the policy would be incontestable, the premium having been fully paid and the policy being in full force and effect from its date, unless it rescinded and repudiated it within one year from its date, thereafter, under its stipulation, it had no defense against the payment of it, excepting only for the non-payment of premium. It permitted the year and more to expire before it took any action to avoid and rescind the policy, and there being no default in the premium, it has, as before stated, no defense to the collection of the full amount of it."
>
> "The clause in question fixes the date within which any such attempt may be made by the insurer as one year from date of the policy, and it does not embrace the contingency of the lifetime of the insured. That is *it does not say that the policy shall be incontestable one year from its date during the lifetime of the insured,* but merely that it shall be incontestable after one year from its date."

In *Hardy* v. *Phenix Mutual Life Insurance Company*, 180 N. C. 180, 104 S. E. 166, the insured died within the contestable period, and the court says:

> "If, therefore, there is anything in the clause itself changing its terms or effect upon the death of the insured within one year, if the clause was inserted for the benefit of the Insurance Company to enable it to increase its business, if the period of one year after which the policy was to become incontestable was to afford opportunity to the company to make it investigations, and to commence action for the cancellation of the policy, and if during the whole of the year someone has been in existence, the beneficiary against whom an action can be brought, we see no reason for refusing to give the plaintiff the full benefit of the clause as it is written. The death of the insured did not place the defendant at any disadvantage under the policy, nor estop its investigations, nor did it affect its right to commence an action, and in most cases *death would inure to the benefit of the company, if it contemplated an action to cancel the policy by removing a hostile witness.*"

In *Monahan* v. *Metropolitan Life Ins. Co.*, 283 Ill. 136, 119 N. E. 68, L. R. A. 1918 D, 1196, it was held that the incontestable clause in a life insurance policy inures to the beneficiary after the death of the insured as much as it inures to the insured during his lifetime, and that even though some of the rights and obligations of the parties to the contract of insurance become fixed upon the death of the insured, *the rights as affected by the incontestable clause, do not become fixed at the date of the death.* It is held that *such clause continues operative for the period of time specified in the contract.*

The court says:

"Incontestable provision in insurance policies have been held valid as creating a short statute of limitations in favor of the insured, the purpose of such provision being to fix a limited time within which the insurer must ascertain the truth of the representations made. * * * This being the purpose for fixing a specified time after which the policy shall be incontestable, it is not apparent, as plaintiff in error suggests, that the meaning of the clauses here involved is that the policy shall not become incontestable until it has been in force for two years. *There is nothing in this clause to indicate that the parties were contracting that plaintiff in error should have two years during the lifetime of Fay in which to investigate and determine whether false statements had been made in the application for the insurance.* Plaintiff in error reserves two years' time in which to make such investigation, and to determine whether there has been such a breach of warranty as would authorize it to rescind its contract. * * * *The incontestable clause in a policy of insurance inures to the benefit of the beneficiary after the death of the insured, as much as it inures to the benefit of the insured himself during his lifetime.* The rights of the parties under such an incontestable clause as the one contained in this contract do not become fixed at the date of the death of the insured. In case of a breach of warranty the insurer must assert its claim within the two year period, whether the insured survives that period or not, *either by affirmative action or by defense to a suit brought on the policy by the beneficiary within the two years.*"

Ebner v. *Ohio State Life Ins. Co.*, 69 Ind. A. 32, 121 N. E. 315, 317, is a recent case. It discusses every

point involved in the case at bar. In that case the insured died before the expiration of the incontestable period. Before the expiration of that period an action was brought in equity to cancel the policy, and in that action a cross complaint was filed asking for the recovery of the amount of the policy. The court held that the insurer was under the facts entitled to have the policy cancelled. The court says:

> "Proceeding to a consideration of the case in its general features, we are first required to construe the incontestability provision of the policy, which for purposes of this case is as follows: 'After one year this policy shall be incontestable. * * *' There were certain exceptions which need not be further noticed, as they are not applicable here. It is appellee's contention that this provision should be construed to mean that a policy containing it is noncontestable after one year, provided it continues in force for that length of time, or provided it does not mature by the death of the insured before the expiration of the year; that, where the insured dies within the year, the provision has no application. Appellant, however, contends that, regardless of when the policy matures or the death of the insured occurs, a contest of the policy must be commenced within the year or it is forever barred; that, after the decease of the insured, the insurer may not contest the policy by an affirmative action, but only by a defense to a proceeding brought to enforce it; that, as a consequence, where the insured dies within the year, the representative of the insured or his beneficiary brings an action on it to enforce it, in which case the insurer may within the year, but not thereafter, commence a contest by defending against such action; that a contest seasonably and properly commenced, how-

ever, may be continued after the expiration of the year. It is apparent that the construction for which appellee contends requires that there be read into the provision something which it does not in terms contain. *Had it been the purpose of the author of the provision or the intent of the parties to the contract in consenting to it to stipulate that appellee's right to contest should be limited to a period of one year, only in case the policy continued in force for that length of time or longer, it would seem that apt language to that effect might have been employed."*

(2) *The Insurance Company could have maintained an action to cancel the policy after the death of Mr. Hurni.*

While there might be some justification for a holding, where the estate is the beneficiary, that the death of the insured has the effect of arresting the running of the conventional period, in case there is delay in the appointment of a representative of the estate of the deceased, there would be no justification for such a holding in this case because the beneficiary, the Hurni Packing Company, is a corporation, which continued in existence after the death of Mr. Hurni, and was at all times during the two-year period amenable to an action for the cancellation of the policy.

V.

Insurance company did not contest within two years.

A contest which must be made by the Insurance Company in order to arrest the running of the period of limitation must be by some "affirmative action," either

by bringing suit to cancel the policy or by making defense to an action brought upon the policy.

Did the Insurance Company take affirmative action? We contend that it did not do so within the two year period.

The date of the execution of the policy and the date from which the rights and obligations of the insured commenced to run was August 23, 1915. It follows that the expiration of the contestable period commenced on the same date and expired on August 23, 1917, unless a different rule is to be applied to the insurer from what it applied to the insured. Applying the rule we contend for, there was no contest within the two years period. Even counsel for petitioner will doubtless make that concession.

The application for insurance is dated September 2, 1915, and the date of medical examination was September 3, 1915. We contend also that the Insurance Company made no contest before September 3, 1917.

The date of the delivery of the policy is admitted to have been on September 13, 1915. We contend also that no contest was made before September 13, 1917

The record shows that after proofs of death and after demand made by the Packing Company that the policy be paid, the general solicitor of the Insurance Company wrote that "the company has evidence satisfying it that the deceased made untrue statements in his application concerning his health and attendance by physicians. In view of these untrue statements, the company *is not legally liable to pay the claim.* This

statement of the grounds of the company's action is made without prejudice to any and *all grounds of defense* that may exist."

This letter was mailed in New York City on August 24, 1917, and was received by the beneficiary on August 27, 1917 (Trans. p. 70).

Suit was commenced by the Packing Company on August 28, 1917, by the service of an original notice for the November term, and the Insurance Company by letter written August 27, 1917, was asked to make up the issues at the September term of court in order that the cause might be tried at the November term. The reply of the Insurance Company, under date of August 31st, is to the effect that "the case will be placed in the hands of local counsel at Sioux City, Iowa," and that such "counsel would be held responsible for conducting the defense" (Transcript, p. 69).

On September 20, 1917, a letter to the Insurance Company from the attorney for the Packing Company states that "the petition has been filed and I have just examined the records at the court house and find that the defendant's copy of the petition has not been removed from the files. I conclude from this, that local counsel have not been advised of the commencement of the action. I would like to be able to communicate with your local counsel but can not do so, of course, until I learn who they are" (Trans. p. 69).

Under date of September 24, 1917, the general solicitor of the Insurance Company wrote *"we have not as yet selected counsel in Sioux City.* Am I not right

in understanding that an appearance or an answer will not be due until the 1st Monday in November. However this may be, as soon as we have selected local counsel, I will be glad to advise you his name. If I am not right as to the last date for appearing and answering, I will be obliged if you will advise me" (Trans. p. 68).

The intention of the insurance company to actually contest the cause was not manifest until November 5, 1917, when a petition and bond for removal to the United States District Court was filed and the order of removal obtained (Trans. p. 9).

The first step to terminate the contract —to contest —was taken on November 12, 1917, on which date "the defendant company duly tendered to the Hurni Packing Company and Minnie B. Hurni, executrix of the last will and testament of Rudolph Hurni, deceased, the sum of $2150.00, being the amount of the premium paid to the defendant on Policy No. 2251875 together with interest thereon at the rate of six per cent from the time of payment thereof to the date of said tender" (Trans. p. 54).

It was not until December 13, 1917, that a legal contest was made by the Insurance Company and this was made by filing an answer in the cause alleging that the policy had been procured by fraud and misrepresentation and praying as follows: *"that the policy sued upon be declared null and void and of no force and validity and that plaintiff's petition be dismissed at its costs"* (Trans. p. 15).

These facts are undisputed and they indicate a *determination* on the part of the Insurance Company *to*

defer to the very latest possible date the defense which they thought they had to the policy and a determination to avoid as long as possible making known the exact nature of their defense. It was not until November 12, 1917, that the first step was taken to cancel the policy by tendering back the premiums paid and this tender was kept good by pleading it in their answer and by asking that the policy be declared null and void.

In view of this record of what was done can there be any doubt that the contest of the policy within the contemplation of its terms was not commenced by the petitioner until November 12, 1917?

(1) *It is evident from the foregoing that the insurance company, not only failed to contest within the two-year period, but it persistently put off the date of the contest till the very last moment for reasons not readily discernable.*

In the letter of the insurance company of August 24 (Transcript. p. 81), it did not even state that it would contest the policy. It only stated that "Payment was declined on the ground, among others, that the deceased made untrue statements." One may "decline" to pay his note for some fancied grievance, but such declination would hardly be considered a "contest."

> "When the execution of a contract has been procured by the fraud of one of the parties, the innocent party, upon discovering the fraud, may still insist upon the contract or may rescind it. He must, however, if he desires to repudiate it, do so promptly upon discovering the fraud and con-

sistently adhere to his intention. By delay or vacillation he waives his right to rescind."

Ramsay v. *Old Colony Life Ins. Co.*, 297 Ill. 592, 131 N. E. 108, 109.

"It has also been properly said: Such 'a stipulation * * * ought to be an incentive for the insurer to exercise vigilance and good faith in investigating the truth or falsity of the representations upon which the policy is issued, while the matter is fresh (and thus it operates fairly between the parties). The witnesses are all alive, and the exact truth can, if ever, be ascertained, and the stipulation prevents the insurer from lying by and receiving the premiums during the life of the insured, and after his death, when the good faith and the truth of his representations cannot be supported by his own oath (and strengthened by his own efforts and superior knowledge), contesting the policy upon the ground that the insured's representations were false or untrue. Such stipulation is neither unreasonable nor contrary to public policy.' It is true, there is in the policy a stipulation that a fraud shall vitiate it; but this is not inconsistent with the further requirement that the insurer must set up the fraud in the time limited. * * * Fraud is always required to be set up promptly when discovered, or it may be treated as waived; and the effect of this stipulation is that the insurer must exercise due diligence to discover such fraud within the year, and, if it fails to do so, it will treat it as waived, and no inquiry will be made or allowed into such matters."

Clement v. *New York Life Ins. Co.* (Tenn.) 46 S. W. 561; 42 L. R. A. 247, 249.

"By the clause in question appellant took one year for the purpose of investigating and determining whether it would exercise its right to repudiate and rescind its contract on the ground it is now

interposing as a defense. If it had exercised any diligence, and the insured's physical condition was that now claimed by the appellant, it might easily have discovered such condition within the time reserved by it for that purpose. If it failed to exercise vigilance in this respect, it must be treated as having waived its right to deny liability on such ground."

Commercial Life Ins. Co. v. *McGinnis*, 50 Ind. A. 630, 97 N. E. 1018, 1019.

(2) *The Insurance Company must "contest" the policy by taking some affirmative action, either by making defense to an action brought to recover on the policy, or by an action brought by the insurer to cancel or rescind the contract.*

Moran v. *Moran*, 144 Iowa, 451.

Ramsay v. *Old Colony Life Ins. Co.*, 297 Ill. 592, 131 N. E. 108.

Monahan v. *Metropolitan Life Ins. Co.*, 283 Ill. 136, 119 N. E. 68; L. R. A. 1918 D 1196 note.

Jefferson Standard Life Ins. Co. v. *Wilson* (C. C. A.), 260 Fed. 593.

Black on Rescission and Cancellation, Vol. 2, p. 1155.

Ebner v. *Ohio State Life Ins. Co.*, 69 Ind. A. 32; 121 N. E. 315, 319, 320.

Mass. Benefit Life Ins. Co. v. *Robinson* (Ga.), 30 S. E. 918, 42 L. R. A. 261.

Indiana National Life Ins. Co. v. *McGinnis*, 180 Ind. 9, 101 N. E. 289; 45 L. N. S. 192, 196.

Commercial Life Ins. Co. v. *McGinnis*, 50 Ind. A. 630, 97 N. E. 1018, 1019.

Wright v. *Mutual Ben. Life Ins. Co.*, 43 Hun. 61 (quoted in *Mass. Ben. Life Ass'n.* v. *Robinson*, (Ga.) 42 L. R. A. 261, 269).

Duvall v. *National Life Ins. Co.*, 28 Idaho 356, 154 Pac. 632; L. R. A. 1917 E. pp. 333, 339.

American Trust Co. v. *Life Ins. Co.*, 173 N. C. 558, 92 S. E. 706.

Murray v. *State Mutual Life Ins. Co.*, (R. I.) 48 Atl. 800, 53 L. R. A. 742, 743.

Mutual Life Ins. Co. v. *Buford*, (Okla.) 160 Pac. 928.

"While 'contest' as used in statutes, may be treated as 'a word of art,' it is hardly such in ordinary use and signification. The definition by Webster is 'to make a subject of dispute; to call in question; to dispute.' It is frequently used in the sense of, 'to ltigate,' 'oppose,' 'to challenge,' 'to resist,' and, *as applied in legal proceedings it ordinarily implies a dispute between parties plaintiff nnd defendant before a court* which is to decide the question put in issue. It is the contention of appellant that the words 'shall contest the same' as employed by the testator in the will before us ought to be construed as referring to a direct assault upon the entire instrument as a will, upon grounds which if established would render it void in all its parts. That such an attack would be a contest of the will is certain, but that an attack upon the validity of a material part of the will which, if successful, would destroy the integrity of the plan adopted by the testator for the distribution of the estate, is not also a contest within the fair meaning of the words, cannot be conceded."

Moran v. *Moran*, 144 Iowa, 451, 464.

"Such contest can be made only by proceedings in court to which the insurer and the insured or his representatives or beneficiaries, are parties."

Ramsay v. *Old Colony Life Ins. Co.*, 297 Ill. 592, 131 N. E. 108, 110, citing

American Trust Co. v. *Life Ins. Co.*, Va. 173 N. C. 558, 92 S. E. 706.

Mutual Life Ins. Co v. *Buford,* (Okla.) 160 Pac. 928.

In *Jefferson Standard Life Ins. Co.* v. *Wilson,* (C. C. A.) 260 Fed., 593, the appeal was from the action of the District Court for the Southern District of Georgia. The policy provided that it should be incontestable "After one year from date." The action was one to enjoin the beneficiary from bringing suit on the policy and asked that the policy be cancelled for false statements made by the insured in his application. The insured had died within the year. The company claimed that the year had not expired because the action to cancel was commenced within a year from the beginning of the "initial term" of the policy. The court says:

> "Considering together the several papers evidencing the transaction, the conclusion is that the provision in question had the effect of making the policy incontestable after one year from the date of the policy becoming effective. As the policy had been in force for more than a year when the insurer undertook to contest it *by suit,* the asserted right to contest it on the ground relied on was barred by the expiration of the time allowed for contest."

In this case the beneficiary threatened to wait till after the expiration of the year before commencing the action, and the insurance company having sought the injunction to restrain the action on the policy on the theory that the limitation period was running after the death of the insured, the insurer was held estopped from

claiming that the statute did not continue to run after the death of the insured.

> "An examination of the following cases will show that the holding of the courts of this country has been almost universally that every defense to a policy of insurance embraced within the terms of the 'incontestable clause' in *completely lost to the insurer, if it fails to make the defense or take affirmative action within the time limited by the policy.*"
>
> *Indiana Nat'l Life Ins. Co.* v. *McGinnis,* 180 Ind. 9, 101 N. E. 289, 291, 45 L. N. S. 192.

In support of this statement of law the court cites, among a number of cases, the following:

Wright v. *Mutual Ben Ass'n,* 118 N. Y. 237, 6 L. R. A. 731.

Reagan v. *Union Mutual Life Ins. Co.,* 189 Mass. 555, 76 N. E. 217, 2 L. N. S. 821.

Mutual etc. Ass'n v. *Austin,* 142 Fed. 398, 6 L. N. S. 1064.

New York Life Ins. Co v. *Baker,* 83 Fed. 647, 27 C. C. A. 658.

Teeter v. *United etc. Ins. Ass'n,* 159 N. Y. 411, 54 N. E. 72.

In *Mutual Life Ins. Co.* v. *Buford,* (Okla.) 160 Pac. 928, the court quotes with approval *Indiana Life Ins. Co.* v. *McGinnis,* 180 Ind. 9, 101 N. E. 289; 45 L. N. S. 192, including the statement that:

> "An examination of the following cases will show that the holding of the courts of this country has been * * * invariably that every defense to a policy of insurance embraced within the terms of the 'incontestable clause' is completely lost

to the insurer, *if it fails to make the defense, or take affirmative action within the time limited by the policy.*"

In *Wright* v. *Mutual Ben. Life Ass'n,* 43 Hun. 61, it is said:

> "An action for the recovery of the sum insured not being maintainable until after the death of the insured, one effect of the stipulation, if valid, is to prevent the insurer from interposing as a defense the falsity of the representations of the insured. But its effect is not to prevent the insurer from annulling the contract upon the ground of the fraudulent representations of the insured, *provided an action for that purpose is brought in the lifetime of the insured,* and within two years from the date of the policy. The practical and intended effect of the stipulation is, as held by the trial court, to create a short statute of limitations in favor of the insured, within which limited period the insurer must test, if ever, the validity of the policy."

In *American Trust Company* v. *Life Ins. Co.,* 173 N. C. 558, 92 S. E. 706, the action was one brought to recover on a policy of insurance containing the following clause: "This policy shall be incontestable after one year from its date, except for non-payment of premium." Within 12 months of the date of the policy the company notified the insured that it elected to cancel the policy, and tendered the return of the premium, on the ground that it had discovered facts which, in its opinion rendered the policy void, but it refused, on the request of the insured to state what the facts were. The insured died within the year. No action was brought by

the company to have the policy cancelled. In this case the court says:

> "It follows, therefore, that the conduct of the defendant in notifying the insured that it would cancel the policy and in tendering the first premium which had been paid, did not rescind or cancel the contract, as the plaintiff did not consent thereto, and amounted to no more than a breach, and that the remedy of the defendant was to institute an action for cancellation within the year, and as it did not do so, the policy was in force at the expiration of the year. This is also in accordance with the authorities holding that if the defendant wishes to contest, and to avoid the payment of the policy and the force of the incontestable clause, *it must take affirmative action within the time limited by the policy.*"

In this case the court quotes from *Insurance Company* v. *McGinnis,* 180 Ind. 9, 101 N. E. 289, 45 L. R. A. (N. S.) 192; *Murray* v. *Ins. Co.,* 48 Atl. 800, 53 L. R. A. 742; *Wright* v. *Mutual Ins. Co.,* 43 Hun. 61, affirmed in 118 N. Y. 237 and *Insurance Co.* v. *Robinson,* (Ga.) 30 S. E. 918, 42 L. R. A. 261.

> "Viewing the question from all sides, it is our judgment that the provision under consideration must be construed in harmony with appellant's contention; that the language used is not so ambiguous as to call for the insertion of modifying or limiting clauses in order that its meaning may be determined; that by virtue of such provision time is afforded the insurer within which to conduct the necessary investigation to determine the existence of any fact upon which the invalidity or nonbinding force of the policy may be predicated. It does not follow, however, that we concur in appellant's

views respecting the rights of the parties under such a construction, but rather that *if*, as a result of such investigation or of knowledge otherwise obtained, *the insurer desires to contest the policy, appropriate steps to that end, either by a defense to an action brought on the policy in case of the death of the insured, or by proper affirmative action, must be taken within the year.*"

Ebner v. *Ohio State Life Ins. Co.*, 69 Ind. A. 32, 121 N. E. 315, 320.

The Supreme Court of Illinois in the *Ramsey* v. *Old Colony Life Ins. Co.*, 297 Ill. 592, 131 N. E. 108, says with reference to the subject of "contest" in the *Ebner case*, as follows:

"The trial was actually on the cross complaint and the issues made on it, but the Appellate Court held that the filing of the complaint in a court of equity alleging the fact of the incontestable provision and that the defendant intended to delay the action on the policy for the purpose of depriving appellee of its defense was sufficient to invoke the jurisdiction of a court of equity, and that it sufficiently appeared that within the year the appellee proceeded by affirmative action to contest the policy, and that the contest was continued thereafter, without interruption, until its final conclusion in the County Court. While the judgment was actually rendered on the policy and on the issues made on the cross complaint for its enforcement the court, in effect, sustained the equitable jurisdiction of a suit to cancel the policy after the death of the insured within the contestable period and treated the case as a proceeding to contest liability on the policy from the date of the filing of the original complaint."

It is therefore quite evident that what was done in the Ebner case was "affirmative action" taken to contest the policy. The fact situation was therefore quite different from what it is in the case at bar where the *insurance company for the period of three months after the discovery of the alleged fraud, persisted in doing nothing whatsoever,* although urged to act by the packing company, and finally resorted to its "constitutional right and privilege" as a citizen of another state, to remove the cause from the state court to the federal court.

(3) *Right to, and denial of, equitable relief.*

Even if, on account of the death of the insured, the insurer is not able to maintain an action in equity to cancel the policy, it does not extend the time within which contest may be made, unless it can be shown that the action of the beneficiary to recover on the policy is purposely delayed in order to permit the contestable period to elapse.

In a few cases the courts have given consideration to the fact that where the policy is payable to the estate of the insured and the administrator was not appointed till after the expiration of the stipulated period, and it has been held that such fact entitled the insurer to have the time correspondingly lengthened. It must be remembered, however, *in the case at bar, the beneficiary is a corporation, and the death of Mr. Hurni did not in any way prevent an action against the beneficiary, the Hurni Packing Company, the plaintiff in the action.* Moreover, even if it should be considered that Mr. Hurni was a necessary party to an action to rescind brought in his

lifetime, there is no showing, that, he having died testate, an executor was not appointed promptly upon his death.

> "It is the settled law of this circuit (eighth), and of the Supreme Court, that after the death of the insured a suit in equity will not lie for the surrender and cancellation of the policy upon the ground that it was obtained by fraud, for the reason that the company has a plain, speedy and adequate *remedy by interposing the fraud as a defense to an action at law upon the policy.*"
>
> *Greisa* v. *Mutual Life Ins. Co.*, (C. C. A.) 169 Fed. 509, 513.
>
> *Riggs* v. *Marine Life Ins. Co.*, (C. C. A). 129 Fed. 207.
>
> *Mutual Life Ins. Co.* v. *Greisa*, 156 Fed. 398.
>
> "After the death of the insured, the grounds of contest stated in the bill were available to the appellant by way of defense to an action against it on the policy. This being true, the appellant was not entitled to equitable relief, in the absence of *special circumstances* showing that it might suffer irreparable injury unless such relief was granted" (*Insurance Company* v *Bailey*, 13 Wall. 616, 20 L. ed. 501).
>
> *Jefferson L. Ins. Co.* v. *Wilson*, (C. C. A.) 260 Fed. 593, 595.

In *Bankers Reserve Life Company* v. *Omberson*, 123 Minn. 285, 143 N. W. 735. The action was to cancel the policy for fraud or to restrain an action at law thereon. It was held that the action could not be maintained in the absence of some special circumstances of a nature to cause irreparable loss to the plaintiff if he is relegated to his remedy at law by way of defense to an action on the policy. In this case the court says:

"In *Cable* v. *United States L. Ins. Co.,* 191 U. S. 288, 48 L. Ed. 188, the facts were the same, except that an action at law on the policy had been begun before the equity suit was commenced. *Phoenix Mutual L. Ins. Co.* v. *Bailey* was approved and followed. * * * The former case was decided by the United States Circuit Court for the District of Minnesota in 1870; Circuit Judge Dillon writing the opinion, Mr. Justice Miller concurring. The case is a leading one and is persuasive. Some reliance is placed in the opinions upon the limitations in the policy as to the time of bringing suit; Mr. Justice Miller saying that this, *and the allegation that defendants were threatening to sue at law, showed there was no danger of indefinite delay"*

In *Monahan* v. *Metropolitan Life Ins. Co.,* 283 Ill. 136, 119 N. E. 68, L. R. A. 1918 D. 1196, 1198, it is said:

"It is suggested that the construction contended for by defendant in error might work a hardship upon the insurer where policies are made payable to the legal representative of the insured, as in this case, as, where knowledge of a breach of warranty is acquired after the death of the insured, so short a time might elapse between the date of death of the insured and the termination of the two-year period that it would be impossible to secure that appointment of a legal representative, and the insurer would be helpless to effect a rescission of cancellation of the contract, should it desire to do so. Such a situation does not exist in this case. *The administrator in the estate of Fay was appointed in apt time, and before the expiration of the two-year period.* Plaintiff in error had ample time, if it desired to do so, to take such action as it should see fit for the cancellation of the

policy upon the ground that the representations made by Fay in his warranties were false. It cannot complain if, by reason of its own language inserted in the contract, it has created a situation which in some instances might make it more difficult for it to assert and maintain its rights."

In *Phoenix Mutual Life Ins. Co.* v. *Bailey*, 13 Wall. 616, 20 L. Ed. 501, it is said:

> "Where a party, if his theory of the controversy is correct, has a good defense at law to a 'purely legal demand,' he should be left to that means of defense, as he has no occasion to resort to a court of equity for relief, unless he is prepared to allege and prove some *special circumstances* to show that he may suffer irreparable injury if he is denied a preventive remedy."

The last case is quoted with approval in the case of *Ramsay* v. *Old Colony Ins. Co.*, 297 Ill. 592, 131 N. E. 108, 111, where it appeared that there were "special circumstances" in that beneficiaries could defeat the right of the company to set up the defense at law by refraining from suit until after the expiration of the incontestable period, and it was held that the company could maintain a suit in equity against the beneficiary or personal representative of the insured to establish their defense against the policy. In this case the court, however, says:

> "When the insured died on April 13, 1917, 7 months of the year after the policy was issued had elapsed. The administrator was not appointed until July 19, 1918. After that there was nothing to prevent the defendant from contesting its liability on the policy. Suit was begun against it in November, 1918, but it filed no plea denying its

liability upon the policy until May 12, 1919, nearly ten months after the appointment of the administrator and, excluding the time during which it was prevented from bringing suit by reason of the failure to appoint an administrator, nearly 17 months after the date of the policy. The plea alleged that knowledge of the falsity of the answers did not come to the defendant till July 1, 1918, but there were several months after its discovery of the fraud and after the appointment of the administrator before the expiration of the year in which it might have filed a bill to cancel the policy. It failed to do so and by its neglect permitted the incontestable period fixed by the policy, even under the construction which we have given it, to elapse. It was therefore barred by its contract from making the defense it sought to make and the demurrer to the plea was properly sustained."

(4) Is the petitioner entitled to take advantage of the claim that there are *"special circumstances" on account of which it could defer making defense to the action brought in the state court from August* 28, 1917, *to December* 13, 1917, *without waiving its right to make defense.*

A case decisive of this point, as well as of a number of others is the case of *Cable* v. *United States Life Ins. Co.*, 191 U. S. 288, 48 L. Ed. 188, cited by counsel for petitioner, and it has been left till the last to be quoted at length. That case was an action brought by the insurance company in the Circuit Court of the United States against the administratrix of the insured to cancel a policy of insurance on the ground that it was procured by the fraud of the agent. The company was a non-

resident of the State of Illinois where the administratrix had commenced suit on the policy in the state court but was licensed by that state to transact business therein. The Illinois Legislature had passed a law to forfeit the right to do business in the state by any insurance company which sought to remove an action against it brought in the state court. It was contended by the insurance company as a reason why it was entitled to equitable relief, that while it had the right of removal, it would be hazardous to the company; that the position of the defendant in an action is not as advantageous as that of the plaintiff, as the plaintiff has the conduct of the case largely within its own control, and that the law as administered in the state court was not as favorable to insurance companies as the law administered in the federal court and that the company had the right to the benefit of the administration of the law in the federal court on account of the diversity of citizenship which existed. The court first quotes from *Phoenix Ins. Co.* v. *Bailey*, 13 Wall. 616, 20 L. Ed. 501, as follows:

> "By the death of the *cestui que vie* the obligation to pay, as expressed in the policies, became fixed and absolute, subject only to the condition to give notice and furnish proof of that event within ninety days. Notice having been given and the required proof furnished, the obligation to pay certainly became fixed by the terms of the policies, and the sums insured became a purely legal demand, and if so, it is difficult to see what remedy more nearly perfect and complete the appellants can have than is afforded them by their right to make defense at law, which secures to them the right of

trial by jury. Where a party, if his theory of the controversy is correct, has a good defense at law to a 'purely legal demand,' he should be left to that means of defense, as he has no occasion to resort to a court of equity for relief, unless he is prepared to allege and prove some special circumstances to show that he may suffer irreparable injury if he is denied a preventive remedy." * * *

The court then says:

"Complainant insists that in this case *special circumstances* are shown that it may suffer irreparable injury if jurisdiction be denied. Those special circumstances have already been mentioned, and the question is whether they are sufficient to furnish ground for a federal court of equity to take jurisdiction herein.

"We start with the proposition that, to any action brought upon the policy in a federal court, the company would have a complete and adequate defense by proving the fraud as alleged in the bill herein. That shows a defense in the same jurisdiction resorted to by the complainant herein. It is answered, however, that the action has not been commenced in the federal court, but, on the contrary, the administratrix has commenced her action in the state court, and hence the defense, if made in the state court, is not in the same jurisdiction as that in which the bill in this case was filed. But the company may bring its defense within the same jurisdiction by removing the case from the state to the federal court, which it has the right to do on account of the diversity of citizenship of the parties thereto. * * * We think the existence of these facts furnishes no ground for appealing to a federal court of equity to take jurisdiction of a suit to cancel the policy, where otherwise the court would have none. The state statute could not prevent the removal. If, because of a removal, ground was

furnished for the revocation of the license, that fact would not justify a resort to a federal court, and ought not to, because as we have said already, *the contingency is one of the complainant's own creation, and it ought not therefore, to be able to avail itself of an embarrassment which it has voluntarily created, as a foundation for jurisdiction in a federal court which would not otherwise exist.* * * *

"Still less do we think that any foundation is laid for that jurisdiction based upon the theory that the company would not have the same control of the case as a defendant that it would as plaintiff. That is not the case in modern practice. The defendant can urge the case to trial against the desires of the plaintiff, and its defense may be shown as well and conveniently by a defendant as the cause of action may be shown by the plaintiff. The right of the plaintiff to discontinue the action does not furnish ground for equitable jurisdiction. If it did, then equity would always have jurisdiction, and the rule would be worthless."

It follows that the contention on the part of counsel for petitioner that the running of the contestable period stopped with the death of Mr. Hurni is not warranted because it is not shown on the part of the Insurance Company that "special circumstances" existed warranting an action in equity to cancel the policy, because there is no showing that there was any delay in bringing an action at law by the Packing Company to recover on the policy; that on the contrary it is shown that the action was brought the day following the receipt of the letter of the Insurance Company declining to pay the policy, and the Insurance Company did nothing for two months after the delivery of the policy, if the date of

delivery is to be taken as the date of the commencement of the contestable period.

VI.

Effect of First Trial and First Appeal.

The Insurance Company was the plaintiff in error when this cause was before the Circuit Court of Appeals after the first trial below. The assignment of errors was in substance that the trial court erred in directing a verdict for the Packing Company and in refusing to direct a verdict for the Insurance Company.

The Circuit Court of Appeals in its opinion in the case (260 Fed. 641), in conclusion says:

> "The answer having been untrue, and the matter material, and the maker of the statement necessarily knowing that it was untrue when he made it, *the intention to deceive the insurer is necessarily implied as the natural consequence of such act.* * * * On the evidence as presented the court should have directed a verdict for the defendant."

In other words, that court said that as a matter of law, "The intention to deceive the insurer is necessarily implied as the natural consequence," of the untrue statement made as to consultation with physicians.

That court appeared to have arrived at that conclusion notwithstanding the undoubted rule to the contrary, adopted by the Iowa Supreme Court, as set forth in a number of cases, including the following, wherein the facts were very similar—if not identical:

Ley v. *Metropolitan Life Insurance Co.*, 120 Iowa, 203, 210.

Lakka v. *Modern Brotherhood*, 163 Iowa, 159, 170.
Murphy v. *National etc. Ass'n.*, 179 Iowa, 213, 222 (179).
Smith v. *Packard Co.*, 152 Iowa, 1, 6.

It being the rule in Iowa that the presumption of intent is not conclusive, even if it is shown that the insured had knowledge of the falsity of the representation, we insist that the Circuit Court of Appeals should have followed that rule, in accordance with the holdings of the federal courts that they will follow the rule adopted by the courts of last resort of the state where the cause of action arose, especially in insurance cases. That is the rule of the following cases:

John Hancock Life Ins. Co. v. *Warren*, 181 U. S. 73, 45 L. Ed. 755.
New York Life Ins. Co. v. *Cravens*, 178 U. S. 389, 44 L. Ed. 1116.
Equitable Life Assur. Soc. v. *Brown*, 213 U. S. 25, 53 L. Ed. 682.
McClain v. *Provident etc. Ass'n.*, 49 C. C. A., 29; s. c. 184 U. S. 699, 46 L. Ed. 765.
Orient Ins. Co. v. *Daggs*, 172 U. S. 577, 43 L. Ed. 552.

The Hurni policy was an Iowa contract, although the insurer is a New York corporation. The general rule is that "the state where the application is made and where the premium is paid and the policy delivered is that where the contract was entered into."

Mutual Life Ins. Co. v. *Cohen*, 179 U. S. 262, 45 L. Ed. 181.
New York Life Ins. Co. v. *Russell*, (C. C. A.) 77 Fed. 94.

Albro v. *Manhattan Life Ins. Co.*, (C. C. A.) 119 Fed. 629.
Equitable Life Ins. Co. v. *Winning*, (C. C. A.) 58 Fed. 541.
Fletcher v. *New York Life Ins. Co.*, 13 Fed. 526.

It will be noted that in the opinion of the court upon the first appeal the only Iowa decision cited to sustain its conclusion, that "the intent to deceive the insurer is necessarily implied as the natural consequence of the act," was the case of *Boddy* v. *Henry*, 126 Iowa, 31. In relying upon that case for the rule, with reference to intent in actions involving fraud the Circuit Court of Appeals was unfortunate, for the reason that *Boddy Case* had been "explained" prior to the time when the court rendered its decision, as clearly appears from the more recent case of *Smith* v. *Packard & Co.*, 152 Iowa, 1, 6, where it is said:

> "Plaintiff complains of this instruction. He urges that he was not required to prove an intent to deceive. In support of this contention, reliance is placed upon *Boddy* v. *Henry*, 126 Iowa, 31. Counsel misconceives the purport of the holding in that case. Intent to deceive is necessarily the gist of an action of deceit. The burden of proving it is necessarily upon the plaintiff. The method of proving it is quite another question. It is always an element of plaintiff's case, necessary to be alleged, and therefore necessary to be established. * * * Some courts have gone to the extent of holding *that the presumption of intent is conclusive, if* knowledge of the falsity of the representation is shown, but such is not the rule adopted in the majority of jurisdictions, and it *is not the rule in this*

> *state.* The fact, therefore that the intent to deceive may be presumed or inferred from the defendant's knowledge of the falsity of the representation does not eliminate it as an element from plaintiff's case, nor does it relieve him from the burden of proof thereon. The fact remains that before he can recover *the jury must find from the evidence as a whole, in the light of all the circumstances shown, that the defendant intended to deceive."*

Upon the second trial of the case below, counsel for the Packing Company attempted to show and we believe did show circumstances to convince both the court and jury that there was no intent on the part of Mr. Hurni to deceive. *If any presumption of intent* to deceive was "necessarily implied" from what he said and did, *it was fairly rebutted* by the testimony of the agent who took Mr. Hurni's application. *This testimony is in addition to the testimony taken at the first trial and before Court of Appeals on the first appeal,* all of which original testimony was offered and introduced in evidence on the second trial, and is a part of the record in this case (Trans. pp. 54-59).

This evidence coupled with the evidence of the other witnesses, showing the personal traits and character of Mr. Hurni, clearly indicates that an intent to defraud the insurer was entirely foreign to his thought and purpose. We call this evidence to the court's attention for the purpose of showing its materiality and for the purpose of showing that the *record as a whole as it now stands is substantially different,* on the subject of Mr. Hurni's intention, from what it was when the cause was before

this court on the first appeal, and for the purpose of showing that while the rule as to the "law of the case" is as counsel for petitioner suggests, it should not be applied in this case as the record now stands.

It is only where the evidence is the same that the rule referred to is applied and even then the rule has its exceptions. The application of this rule is the subject of a very extended note to the case of *U. S. Annuity etc. Co.* v. *Peak*, 129 Ark. 43, 195 S. W. 392, 1 A. L. R. 1259, 1270. See also *Messinger* v. *Anderson*, 225 U. S. 436, 56 L. Ed. 1152.

Had there been no additional testimony on the part of the plaintiff to rebut the presumption of intent, in view of the rule which the Circuit Court of Appeals established as the law of the case by its opinion on the first appeal, then it might be claimed, that the fact situation on the second appeal, with reference to fraud was the same as it was on the first appeal. Such claim, however, cannot now fairly be made. In other words the respondent has brought itself, in this respect, within the rule adopted in the case of *New York Life Ins. Co.* v. *Wertheimer*, 272 Fed. 730, 734, where it is said:

> "A positive statement of fact, falsely made, with respect to a material matter, will, *nothing else appearing*, be deemed to have been made wilfully and with intent to deceive."

It may be claimed that this division of the argument is uncalled for, in view of the fact that, in reality, the question of the effect of the incontestability clause of the policy alone is involved. Our justification in giving

consideration to the subject is for the purpose of calling to the court's attention to the fact that the rule adopted by the court on the first appeal was based upon an evident misapprehension of the Iowa rule as to necessity of showing intent to defraud as a matter of fact, and for the purpose of showing clearly that the facts relating to and bearing upon the intent of the insured are different from what they were on the former appeal, and that there was, therefore, no reason for the trial court sustaining, at the second trial, as counsel for petitioner insists it should have done, its motion for a directed verdict because of "the law of the case" adopted by this court on the first appeal, or for any other reason.

Otherwise stated, the plaintiff on the second trial was able to show what is believed to be the necessary "countervailing circumstances," using the expression of the writer of the majority opinion on the second appeal.

Effect of Remand for New Trial; Amendment.

After a cause has been remanded for new trial the pleadings may be amended so as to present new issues.

The order of Circuit Court of Appeals, on the first appeal, was as follows:

> "The judgment of the lower court is therefore reversed and a new trial ordered."

After the reversal, the plaintiff asked leave of court to amend its reply to the answer of the defendant, in which it set up the defense of fraud and misrepresentation, and the trial court granted such permission. Ac-

cordingly on June 2, 1920, the plaintiff filed the amendment stating that "the defendant failed to contest the policy of life insurance payable to the plaintiff, by the tender of the return of the premium paid or otherwise, within the two year period in which the policy might be contested as provided by the terms thereof, and it is now barred from setting up or urging any of the defenses set forth in the answer."

The plaintiff in error saved no exception and predicated no error upon the ruling of the court permitting the filing of the amendment.

At the close of the testimony taken at the trial, had on the 19th, 20th, 21st and 22nd days of October, 1920, the plaintiff's motion for a directed verdict, based upon the ground that the evidence showed that "the defendant did not within the contestable period take any affirmative action to cancel the policy or take any action whatsoever to cancel or annul the same, and in fact, failed to tender back the premium until the 12th day of November, 1917, or take any steps whatsoever for the purpose of contesting, cancelling or rescinding the policy of insurance upon which this action is brought upon any grounds set up as a defense" (Trans. p. 17), was sustained and the defendant's motion to direct a verdict on various grounds was overruled.

Counsel for petitioner now claim that the Packing Company was estopped from raising the question as to whether the insurance company did or did not contest the policy within the stipulated time because, as it claims, the question was not raised at the first trial.

It is a well established rule that either party has the right, within the discretion of the court, to amend his pleadings after a cause has been remanded for re-trial. In other words, the cause stands for trial as if no previous trial had been had, with the exception that the law as stated by the appellate tribunal must be followed. The only estoppel which the authorities recognize is the estoppel, if it may be so termed, created by the law as pronounced by the appellate court. That is not such an estoppel as to prevent one from changing the pleadings, if he shall elect to do so.

> "After a cause is remanded to the trial court, that court may receive such additional pleas and admit amendments to those already filed as may appear to be proper."
>
> 21 R. C. L. p. 590.
>
> *Marine Ins. Co.* v. *Hodgson*, 6 Cranch 206, 3 L. Ed. 200.
>
> *Tremaine* v. *Hitchcock*, 23 Wall. 518, 23 L. Ed. 97.
>
> *Adams County* v. *Burlington, etc. Co.*, 44 Iowa 335.

Conclusion.

In this brief and argument we have endeavored to sustain each conclusion by the citation of authorities which, at least, challenge attention. We do not ask the court to determine this case by arguments as if the points involved were only those of "first impression." We believe that we are amply justified in stating that

every point made by adverse counsel has been fully met and answered by a sufficient number of "authorities directly in point." We feel, therefore, that we are entitled to ask that the action of the Circuit Court of Appeals be affirmed.

Respectfully submitted,

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MUTUAL LIFE INSURANCE COMPANY OF NEW YORK *v.* HURNI PACKING COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 66. Argued October 11, 1923.—Decided November 12, 1923.

1. In case of ambiguity in a life insurance policy, that construction is to be adopted which is most favorable to the insured. P. 174.
2. The word "date," as applied to a written instrument, signifies primarily the time specified therein. P. 174.
3. Where a life insurance policy declared that it should be incontestable, except for nonpayment of premiums, provided two years should have elapsed "from its date of issue," *held*, that the date intended was the one specified in the policy, although this (by agreement of the parties) was earlier than the dates of actual execution and delivery. P. 175.
4. A provision of a life insurance policy that it shall be incontestable after a specified period from its date of issue inures to the beneficiary of the policy, and applies where the period elapses after the death of the insured. P. 176.

280 Fed. 18, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals, which affirmed a judgment of the District Court for the plaintiff, the present respondent, in an action to recover the amount of a life insurance policy.

Mr. James M. Beck, with whom *Mr. Frederick L. Allen*, *Mr. Ralph L. Read*, and *Mr. Guy T. Struble* were on the brief, for petitioner.

I. The policy was void for fraud.

II. The two-year contestable period commenced to run either on September 7, 1915, when the policy was actually

executed, or on September 13, 1915, when it was delivered and took effect.

The application provides: "The proposed policy shall not take effect unless and until the first premium shall have been paid during my continuance in good health, and unless also the policy shall have been delivered to and received by me during my continuance in good health." The commencement of the running of the two-year contestability period is expressly stated as the date of issue of the policy. Thus the date of issue is specifically differentiated in the policy itself from the date of the policy.

For the general meaning of the word "issue," see dissenting opinion of Sanborn, J., in this case. Also *Homestead Ins. Co.* v. *Ison*, 110 Va. 18; *Maggett* v. *Roberts*, 112 N. C. 71; *Coleman* v. *New England Life Ins. Co.*, 236 Mass. 552; *McMaster* v. *New York Life Ins. Co.*, 183 U. S. 25.

When the parties to this contract were negotiating, they knew that the date which was to be recited in the policy was to be a fictitious date and not the real date of execution. They also knew that the policy could not be "issued" on that fictitious date because it already had passed. The application was not made until September 2, 1915. The policy had to be executed at the home office of the Company in New York, and was so executed there on September 7, 1915. It then had to be forwarded to Sioux City, Iowa, for delivery, and it was forwarded and was delivered September 13, 1915. Then and only then it became a binding contract. Both parties had agreed that the policy should not be in force and its obligations and limitations would not begin until it was delivered and the first premium paid. It therefore was agreed that the nominal date of the policy should be anterior to the "date of issue." It never was agreed that such date of issue should be the same as a fictitious

date of the policy. Such an agreement would have been impossible of fulfillment because obviously the policy could not be issued on August 23, 1915, that date being more than one week prior to the date it was applied for.

The incontestability clause, limiting as it does the right of the Company to contest its liability under the policy on the ground of fraud, is a self-imposed limitation of right, for the benefit of the insurer. It should not, therefore, be so construed as to inflict a greater limitation on the rights of the Company to defend itself against a fraud than clearly arises from the plain wording and meaning of the clause itself.

Where a contract is valid, there is reason for holding that, as the insurer dictates the terms of the contract, any fair doubt should be resolved in favor of the insured. But does this rule apply with equal force, where the entire contract, including the incontestability provision, is void by reason of the fraud of the insured in procuring the contract? Does public policy require that, where the defense to the policy is that it is void on the ground of fraud, a clause of the void contract, which limits the power to prove the fraud, should be construed against the insurer and in favor of the insured?

Conceding *arguendo* that the incontestability provision must be construed as favorably to the insured as any other executory clause, this rule does not require an unreasonable construction, which would facilitate a fraud.

The fair and unmistakable intention of the parties was that, when the Company assumed responsibility, it should have two full years thereafter to determine whether the insured had practiced any fraud upon the insurer. To reduce this limitation by dating it from an anterior and fictitious date not only reduces the two years which the parties manifestly had in mind, but it might altogether destroy such right of rescission, as it would if the limitation had been only six months from the date of issue, and the

policy had been dated back six months from the time of its actual execution.

By construing the "date of issue" to mean either the date of actual execution, or the date of delivery, when the policy by its terms took effect, and not the fictitious date of execution, each expression is given its rational meaning and the provisions are accordant and harmonious.

III. The death of the insured matured the policy; the rights of the parties became fixed then; and the incontestability clause could not become operative.

There are state authorities holding that such a clause is applicable notwithstanding the policyholder may die before the expiration of the contestability period. We contend that the insured must have lived until the expiration of the period in order to make the policy incontestable. *Jefferson Standard Life Ins. Co.* v. *Smith*, 157 Ark. 499; *Jefferson Standard Life Ins. Co.* v. *McIntyre*, 285 Fed. 570.

The rule that death of the insured stops the running of the contestability period is a necessary implication of the decisions of this Court in *Cable* v. *United States Life Ins. Co.*, 191 U. S. 288, and *Phoenix Ins. Co.* v. *Bailey*, 13 Wall. 616, holding that after death the insurance company cannot bring a suit in equity to rescind for fraud, for the reason that it has a plain, adequate and complete remedy at law by setting up the fraud as a defense in the law action. This rule has been followed in *Griesa* v. *Mutual Life Ins. Co.*, 169 Fed. 509; and *Riggs* v. *Union Life Ins. Co.*, 129 Fed. 207. See also Jud. Code, §§ 267 and 274b. If the insurance company must wait until the action at law is commenced, and assert its defense of fraud in that action, and such remedy is plain, adequate and complete, the rule must rest upon the fact that the rights of both insurance company and beneficiary are fixed by the maturing of the policy through the death of the insured.

There is no doubt that in numerous cases, in both federal and state courts, the question was involved but passed over *sub silentio*. See *Aetna Life Ins. Co.* v. *Moore*, 231 U. S. 543; *Prudential Ins. Co.* v. *Moore*, 231 U. S. 560. An examination of the records in these cases discloses no evidence of any extra-judicial "contest" before the one-year contestability period expired.

The incontestability clause cannot always be given a strictly literal construction in order to fix the date when the contestability period expires. Otherwise, it would often operate to terminate a litigation in the very midst of a trial. Such construction ignores the fundamental fact that, in case of a life insurance policy, the death of the insured is the crucial and decisive fact determining the rights and duties of the contracting parties.

There are many cogent reasons why it may be said that it is the intention of the parties to the contract of insurance that the insured must live two years in order to make the incontestability clause applicable. Against these there can be advanced no reason except that, generally speaking, a policy will be construed, in case of an ambiguity, against the insurance company and in favor of the claimant.

The main error in the decisions of some state courts, which hold the incontestability clause applicable notwithstanding the death of the insured during the contestability period, is in failing to differentiate between the policy of insurance, as such, and the obligation arising therefrom between the claimant and the insurance company after the death of the insured. A contract of insurance necessarily imports, among other things, a so-called "risk." After the insured is dead the contract is no longer one of insurance, but of payment, if the policy is valid. See *Mellen* v. *Hamilton Fire Ins. Co.*, 17 N. Y. 609.

By the incontestability clause the insurance company undertakes that, provided it continues to insure against

the risk for a period of two years after the policy is issued, thereafter it will make no defense against a claim under the policy. It is therefore obvious that the risk must continue for the period of two years.

To state the proposition another way: The insurance company limits its right to cancel or rescind the policy for any reason whatsoever, except for the nonpayment of premiums, to a period of two years, provided the policy exists as a policy of insurance for that time. After two years have elapsed from the date of issue, the policy cannot be rescinded except for the nonpayment of premiums; and in the event of the death of the insured after two years, the obligation to pay becomes absolute. It is obvious that the insurance company intended to reserve to itself the privilege of investigation to determine whether or not it desired to continue the risk. The period of time during which it might investigate is limited to two years. If the insured dies before the two-year period of contestability (and incidentally the period wherein investigation could be made), the insurance company would not be able to make as full and complete an investigation as if the insured were alive and able perhaps to answer questions or be under observation. Moreover the company can neither begin suit nor give notice of rescission until legal representatives are appointed for the deceased insured.

There never was a contract with the beneficiary that the policy should ever be incontestable. There was a contract with the insured that the policy should be incontestable provided the contract relationship between the insured and the insurance company continued during the lifetime of the insured for the period of two years. This construction of the contract is much the more reasonable and just.

IV. Notice by the insurance company denying liability on the policy was a "contest" and prevents the assertion of an estoppel under the incontestability clause.

Mr. Charles M. Stilwill and *Mr. Edwin J. Stason*, for respondent, submitted.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is an action to recover the amount of a life insurance policy issued by the petitioner to Rudolph Hurni. At the conclusion of the evidence the jury found for the plaintiff, respondent here, under the peremptory instruction of the court, and judgment was rendered accordingly. Upon appeal this judgment was affirmed by the Court of Appeals. 280 Fed. 18.

There were two trials below. Upon appeal following the first, the Court of Appeals reversed a judgment in favor of plaintiff on the ground of material misrepresentation by the insured. 260 Fed. 641. Pending the second trial plaintiff amended its reply to the answer and alleged for the first time that this defense was barred, under the terms of the policy, by defendant's failure to contest within two years.

The policy was applied for on September 2, 1915. It was in fact executed on September 7th but antedated as of August 23, 1915, and was delivered to insured about September 13th. The insured died on July 4, 1917.

The application provides that "the applicant upon request may have the policy antedated for a period not to exceed six months." Underneath the heading of the application there was written the direction: "Date policy August 23, 1915; age 47." The testimonium clause, followed by the signatures of the officials, reads: "In Witness Whereof, the company has caused this policy to be executed this 23rd day of August, 1915." The policy acknowledges the receipt of the first premium and provides that a like amount shall be paid "upon each 23rd day of August hereafter until the death of the insured."

The determination of the case depends upon the meaning of a clause in the policy as follows: "Incontestability. This policy shall be incontestable, except for non-payment of premiums, provided two years shall have elapsed from its date of issue." The trial court held that the words "its date of issue" were to be construed as referring to the date upon the face of the policy, viz: August 23, 1915; and this was also the view of the Court of Appeals. The first action taken by the Insurance Company to avail itself of the misrepresentation of the insured was on the 24th day of August, 1917, one day beyond the period of two years after the conventional date of the policy. It is contended on behalf of the Insurance Company: (1) That the period of incontestability did not begin to run until the delivery of the policy, or, in any event, until its actual execution on September 7th; and (2) That the policy was matured by the death of the insured, and the rights of the parties thereby became fixed so that the incontestability clause never became operative, even within the conventional limitation.

First. The rule is settled that in case of ambiguity that construction of the policy will be adopted which is most favorable to the insured. The language employed is that of the company and it is consistent with both reason and justice that any fair doubt as to the meaning of its own words should be resolved against it. *First National Bank* v. *Hartford Fire Insurance Co.*, 95 U. S. 673, 678–679; *Thompson* v. *Phenix Insurance Co.*, 136 U. S. 287, 297; *Imperial Fire Insurance Co.* v. *Coos County*, 151 U. S. 452, 462.

The word "date" is used frequently to designate the actual time when an event takes place, but, as applied to written instruments, its primary signification is the time specified therein. Indeed this is the meaning which its derivation (*datus*=given) most naturally suggests. In *Bement & Dougherty* v. *Trenton Locomotive, &c., Co.*,

32 N. J. L. 513, 515–516, it is said: "The primary signification of the word *date,* is not time in the abstract, nor time taken absolutely, but, as its derivation plainly indicates, time *given* or specified, time in some way ascertained and fixed; this is the sense in which the word is commonly used. When we speak of the date of a deed, we do not mean the time when it was actually executed, but the time of its execution, as given or stated in the deed itself. The date of an item, or of a charge in a book account, is not necessarily the time when the article charged was, in fact, furnished, but simply the time given or set down in the account, in connection with such charge." This language was used in construing a provision of the New Jersey lien law to the effect that no lien should be enforced unless summons be issued "within one year from the date of the last work done, or materials furnished, in such claim"; and, specifically applying it to that provision, the court concluded: "And so 'the date of the last work done, or materials furnished, in such claim,' in the absence of anything in the act indicating a different intention, must be taken to mean the time when such work was done or materials furnished, as specified in plaintiffs' written claim."

Here the words, referring to the written policy, are "from its date of issue." While the question, it must be conceded, is not certainly free from reasonable doubt, yet, having in mind the rule first above stated, that in such case the doubt must be resolved in the way most favorable to the insured, we conclude that the words refer not to the time of actual execution of the policy or the time of its delivery but to the date of issue as specified in the policy itself. *Wood* v. *American Yeoman,* 148 Iowa, 400, 403–404; *Anderson* v. *Mutual Life Insurance Co.,* 164 Cal. 712; *Harrington* v. *Mutual Life Insurance Co.,* 21 N. D. 447; *Yesler* v. *Seattle,* 1 Wash. 308, 322–323. It was competent for the parties to agree that the effective

date of the policy should be one prior to its actual execution or issue; and this, in our opinion, is what they did. Plainly their agreement was effective to govern the amount of the premiums and the time of their future payment, reducing the former and shortening the latter, and, in the absence of words evincing a contrary intent, we are unable to avoid the conclusion that it was likewise effective in respect of other provisions of the policy, including the one here in question. This conclusion is fortified by a consideration of the precise words employed, which are "from *its* [that is, the policy's] date of issue;" or, in other words, from the date of issue as specified in the policy. It was within the power of the Insurance Company if it meant otherwise, to say so in plain terms. Not having done so, it must accept the consequences resulting from the rule that the doubt for which its own lack of clearness was responsible must be resolved against it.

Second. The argument advanced in support of the second ground relied upon for reversal, in substance, is that a policy of insurance necessarily imports a risk and where there is no risk there can be no insurance; that when the insured dies what had been a hazard has become a certainty and that the obligation then is no longer of insurance but of payment; that by the incontestability clause the undertaking is that after two years, provided the risk continues to be insured against for the period, the insurer will make no defense against a claim under the policy; but that if the risk does not continue for two years (that is, if the insured dies in the meantime) the incontestability clause is not applicable. Only in the event of the death of the insured after two years, it is said, will the obligation to pay become absolute. The argument is ingenious but fallacious, since it ignores the fundamental purpose of all simple life insurance, which is not to enrich the insured but to secure the beneficiary, who has, therefore, a real, albeit sometimes only a contingent, interest in the policy.

It is true, as counsel for petitioner contends, that the contract is with the insured and not with the beneficiary but, nevertheless, it is for the use of the beneficiary and there is no reason to say that the incontestability clause is not meant for his benefit as well as for the benefit of the insured. It is for the benefit of the insured during his lifetime and upon his death immediately inures to the benefit of the beneficiary. As said by the Supreme Court of Illinois in *Monahan* v. *Metropolitan Life Ins. Co.*, 283 Ill. 136, 141: "Some of the rights and obligations of the parties to a contract of insurance necessarily become fixed upon the death of the insured. The beneficiary has an interest in the contract, and as between the insurer and the beneficiary all the rights and obligations of the parties are not determined as of the date of the death of the insured. The incontestable clause in a policy of insurance inures to the benefit of the beneficiary after the death of the insured as much as it inures to the benefit of the insured himself during his lifetime. The rights of the parties under such an incontestable clause as the one contained in this contract do not become fixed at the date of the death of the insured."

In order to give the clause the meaning which the petitioner ascribes to it, it would be necessary to supply words which it does not at present contain. The provision plainly is that the policy shall be incontestable upon the simple condition that two years shall have elapsed from its date of issue;—not that it shall be incontestable after two years if the insured shall live, but incontestable without qualification and in any event. See *Monahan* v. *Metropolitan Life Ins. Co., supra; Ramsey* v. *Old Colony Life Ins. Co.*, 297 Ill. 592, 601; *Ebner* v. *Ohio State Life Ins. Co.*, 69 Ind. App., 32, 42–48; *Hardy* v. *Phoenix Mutual Life Ins. Co.*, 180 N. Car. 180, 184–186.

Counsel for petitioner cites two cases which, it is said, sustain his view of the question: *Jefferson Standard Life*

Ins. Co. v. *McIntyre*, 285 Fed. 570, and *Jefferson Standard Life Ins. Co.* v. *Smith*, 157 Ark. 499. But the incontestability clause under review in those cases was unlike the one here. There the clause was: "After this policy shall have been in force for one full year from the date hereof it shall be incontestable," etc. The decisions seem to have turned upon the use of the words "in force," the District Judge in the first case saying: "Are the policies 'in force,' as contemplated in the cause, after the death of the assured occurring prior to one year from the date of the policy? It seems to me that the proper construction of this clause is that it contemplates the continuance in life of the assured during that year; else why except the nonpayment of premiums?" This amounts to little more than a *quaere*, since the question was then dismissed and the case decided upon another ground. We express neither agreement nor disagreement with the construction put by these decisions upon the provision therein considered; but dealing alone with the provision here under review, we are constrained to hold that it admits of no other interpretation than that the policy became incontestable upon the sole condition that two years had elapsed.

Certain difficulties, both legal and practical, said to arise from this interpretation, in respect of the enforcement of the rights of the insurer, are suggested by way of illustration. But these we deem it unnecessary to review. It is enough to say that they do not, in fact, arise in the instant case and they could not arise except as a result of the contract, whose words the Insurance Company itself selected and by which it is bound.

The judgment of the Court of Appeals is

Affirmed.